TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 567.

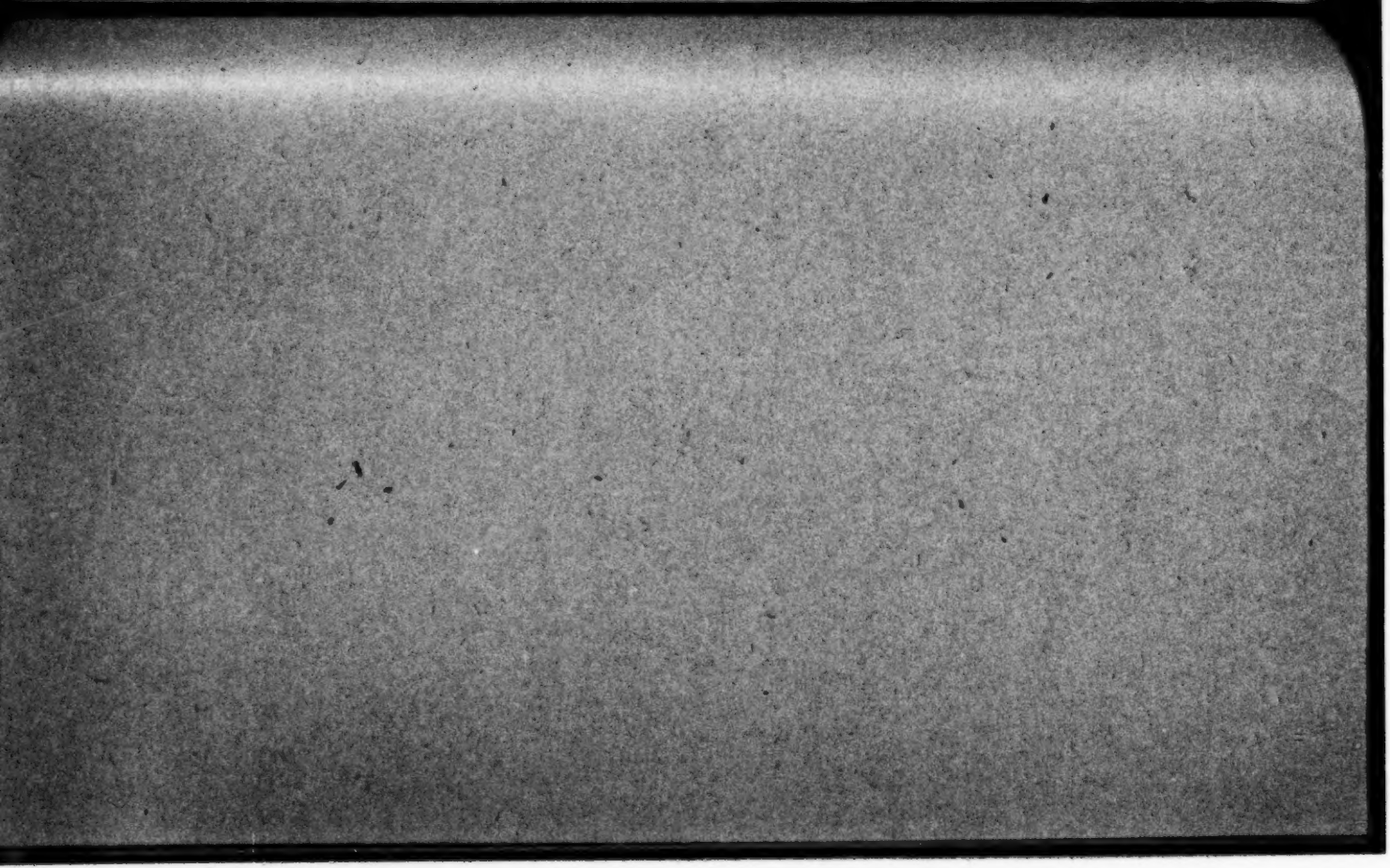
THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRED W. WEITZEL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

FILED JULY 11, 1917.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 567.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRED W. WEITZEL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

INDEX.

1 *Transcript of orders.*

Filed May 16, 1917.

Proceedings had in the District Court of the United States for the Eastern District of Kentucky, at a regular term of court begun and held in the city of Covington, in the Federal Court Hall, on Monday, April 2nd, A. D. 1917, and of our Independence the 141st year.

Court met. Present: Hon. A. M. J. Cochran, judge; J. W. Menzies, U. S. clerk; Thos. D. Slattery, U. S. attorney; R. C. Ford, U. S. marshal.

UNITED STATES, PLAINTIFF,
v.
FRED W. WEITZEL, DEFENDANT. } 3794.

Be it remembered, that heretofore, to wit on the 17th day of October, A. D. 1916, an order was made and entered herein, being in words and figures as follows:

UNITED STATES
vs.
FRED W. WEITZEL. } 3794.

A true bill.

TAYLOR ASBURY, *Foreman.*

2 And on the same day, to-wit, the 17th day of October, A. D. 1916, the following order was made and entered herein:

Order.

This day came the U. S. attorney and the defendant came to the bar of the court in discharge of the requirement of his bond, and having been formally arraigned, it was thereupon demanded of him, the said Fred W. Weitzel, of and concerning the charges against him alleged in the indictment herein, and he pleads that he is not guilty as charged therein.

Whereupon came the U. S. attorney and on his motion, the court being advised, it is ordered that this cause be and the same is continued until the next regular term of court. It is further ordered that the bond of the defendant be and the same is fixed at the sum of $3,000.00, with good and sufficient surety.

Order.

Entered April 2, 1917.

This cause coming on to be heard came the U. S. attorney and upon his motion, the court being advised, it is ordered that this cause be and same is continued and transferred to Catlettsburg for trial on

June 11, 1917. And the clerk of the court is directed to transmit to Catlettsburg the papers herein, together with the transcript of the orders that the case may be properly docketed.

3 It is further ordered that the defendant, F. W. Weitzel, execute bond in the sum of three thousand dollars ($3,000.00) for his appearance at said time and place.

UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, J. W. Menzies, clerk of the United States District Court for the Eastern District of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of all orders herein in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said court at Covington, Kentucky, this 15th day of May, A. D. 1917, and of the Independence of the United States of America the 141st year.

[SEAL.] J. W. MENZIES, *Clerk.*
By O. M. MITCHEL, *D. C.*

4 *Indictment.*

Ret. and filed at Covington October 17, 1916; filed at Catlettsburg May 16, 1917.

UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

In the District Court of the United States of America in and for the Eastern District of Kentucky, held at Covington, Kentucky, at the October term, in the year of our Lord, one thousand nine hundred and sixteen.

The grand jurors of the United States of America, impaneled, sworn, and charged to inquire for the body of the said Eastern District of Kentucky, at the term aforesaid, and inquiring for that district, upon their oath present:

That on the 13th day of August, A. D. 1914, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books,

records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency.

5 That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did, on the 13th day of August, A. D. 1914, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment, and while he was so employed and acting as such receiver and agent of the said national banking association as aforesaid, have, receive, and taken into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of three thousand ($3,000.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last-mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing, and therefore, cannot here set forth), the said sum of three thousand ($3,000.00) dollars then and there being the property of the said national banking association, and which said sum of three thousand ($3,000.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

6 Second count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 2nd day of December, A. D. 1914, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the

United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency, and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 2nd day of December, A. D. 1914, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment, and while he was so employed and acting as such receiver and agent
7 of the said national banking association, as aforesaid, have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of fifty-eight and 50/100 ($58.50) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing and, therefore, can not here set forth), the said sum of fifty-eight and 50/100 ($58.50) dollars then and there being the property of the said national banking association, and which said sum of fifty-eight and 50/100 ($58.50) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds, and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

8 Third count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 12th day of December, A. D. 1914, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders

theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency, and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 12th day of December, A. D. 1914, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment and while he was so employed and acting as such receiver and agent of the said
9 national banking association as aforesaid, have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of seventy-five ($75.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing and therefore cannot here set forth), the said sum of seventy-five ($75.00) dollars then and there being the property of the said national banking association, and which said sum of seventy-five ($75.00) he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did then and there wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

10 Fourth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 25th day of January, A. D. 1915, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to

proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency, and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 25th day of January, A. D. 1915, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment
11 and while he was so employed and acting as such receiver and agent of the said national banking association as aforesaid, have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of two hundred ($200.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last mentioned moneys and funds, respectively, the grant jurors aforesaid have no means of knowing, and, therefore, cannot here set forth), the said sum of two hundred ($200.00) dollars then and there being the property of the said national banking association, and which said sum of two hundred ($200.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

12 Fifth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 6th day of April, A. D. 1915, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; and said national

banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 6th day of April, A. D. 1915, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment and while he was so employed and acting as such receiver and
13 agent of the said national banking association as aforesaid, have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of fifteen ($15.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing, and, therefore, cannot here set forth), the said sum of fifteen ($15.00) dollars then and there being the property of the said national banking association, and which said sum of fifteen ($15.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

14 Sixth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 15th day of July, A. D. 1915, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in

the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation, and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 15th day of July, A. D. 1915, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment, and
15 while he was so employed and acting as such receiver and agent of said national banking association as aforesaid, have receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of one hundred and twenty ($120.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last-mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing, and, therefore, cannot here set forth), the said sum of one hundred and twenty ($120.00) dollars then and there being the property of the said national banking association, and which said sum of one hundred and twenty ($120.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

16 Seventh count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 16th day of July, A. D. 1915, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Ken-

tucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation, and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency, and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 16th day of July, A. D. 1915, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment, and while he
17 was so employed and acting as such receiver and agent of the said national banking association as aforesaid, have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of one hundred ($100.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last-mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing, and, therefore, cannot here set forth), the said sum of one hundred ($100.00) dollars then and there being the property of the said national banking association, and which said sum of one hundred ($100.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

18 Eighth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 17th day of July, A. D. 1915, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London,

in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency, and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 17th day of July, A. D. 1915, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment,
19 and while he was so employed and acting as such receiver and agent of the said national banking association as aforesaid, have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association to a large amount and of great value, to wit, to the amount and of the value of fifty ($50.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last-mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing, and, therefore, cannot here set forth), the said sum of fifty ($50.00) dollars then and there being the property of the said national banking association, and which said sum of fifty ($50.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

20 Ninth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 13th day of August, A. D. 1915, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then

and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized and established and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation, and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 13th day of August, A. D. 1915, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment,

21 and while he was so employed and acting as such receiver and agent of the said national banking association as aforesaid, have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of four hundred ($400.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing and, therefore, cannot here set forth), the said sum of four hundred ($400.00) dollars then and there being the property of the said national banking association, and which said sum of four hundred ($400.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

22 Tenth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 4th day of September, A. D. 1915, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a

certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency, and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Wietzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 4th day of September, A. D. 1915 at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment, and while he
23 was so employed and acting as such receiver and agent of the said national banking association as aforesaid have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of one hundred ($100.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing and therefore cannot here set forth), the said sum of one hundred ($100.00) dollars then and there being the property of the said national banking association, and which said sum of one hundred ($100.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did then and there wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

24 Eleventh count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 11th day of September, A. D. 1915, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and

there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established, and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did, on the 11th day of September, A. D. 1915, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment and while he was so employed and acting as *as* such receiver and agent of the said national banking association as aforesaid have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of fifty ($50.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing and, therefore, cannot here set forth), the said sum of fifty ($50.00) dollars then and there being the property of the said national banking association and which said sum of fifty ($50.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds, and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Twelfth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 17th day of November, A. D. 1915, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then

and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency, and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 17th day of November, A. D. 1915, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment
27 and while he was so employed and acting as such receiver and agent of the said national banking association as aforesaid, have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of sixty ($60.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last-mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing, and, therefore, cannot here set forth), the said sum of sixty ($60.00) dollars then and there being the property of the said national banking association and which said sum of sixty ($60.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

28 Thirteenth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 19th day of November, A. D. 1915, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a

certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency, and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 19th day of November, A. D. 1915, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment
29 and while he was so employed and acting as such receiver and agent of the said national banking association as aforesaid, have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association to a large amount and of great value, to wit, to the amount and of the value of forty-three and 33/100 ($43.33) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last-mentioned moneys and funds, respectively, the grant jurors aforesaid have no means of knowing, and, therefore, cannot here set forth), the said sum of forty-three and 33/100 ($43.33) dollars then and there being the property of the said national banking association, and which said sum of forty-three and 33/100 ($43.33) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

30 Fourteenth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 3rd day of December, A. D. 1915, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 3rd day of December, A. D. 1915, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment, and while he

31 was so employed and acting as such receiver and agent of the said national banking association as aforesaid, have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of fifty ($50.00) dollars (the particular kinds descriptions, numbers, amounts, and values of which last mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing and therefore cannot here set forth), the said sum of fifty ($50.00) dollars then and there being the property of the said national banking association, and which said sum of fifty ($50.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

32 Fifteenth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 7th day of January, A. D. 1916, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established, and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 7th day of January, A. D. 1916, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment and

33 while he was so employed and acting as such receiver and agent of the said national banking association as aforesaid, have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of two hundred and fifty ($250.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing and, therefore, cannot here set forth), the said sum of two hundred and fifty ($250.00) dollars then and there being the property of the said national banking association and which said sum of two hundred and fifty ($250.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

34 Sixteenth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 18th day of April, A. D. 1916, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency and was then and thereacting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 18th day of April, A. D. 1916, at the said own of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment and while he was so employed and acting as such receiver and
35 agent of the said national banking association as aforesaid, have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of two hundred ($200.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last-mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing and, therefore, cannot here set forth), the said sum of two hundred ($200.00) dollars then and there being the property of the said national banking association, and which said sum of two hundred ($200.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

36 Seventeenth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 18th day of April, A. D. 1916, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 18th day of April, A. D. 1916, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment and while

37 he was so employed and acting as such receiver and agent of the said national banking association as aforesaid have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of two hundred ($200.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing, and, therefore, cannot here set forth), the said sum of two hundred ($200.00) dollars then and there being the property of the said national banking association, and which said sum of two hundred ($200.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

38 Eighteenth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 2nd day of June, A. D. 1916, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency, and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association, as aforesaid, did on the 2nd day of June, A. D. 1916, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment and while he

39 was so employed and acting as such receiver and agent of the said national banking association as aforesaid, have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of fifteen ($15.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last-mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing and, therefore, cannot here set forth), the said sum of fifteen ($15.00) dollars then and there being the property of the said national banking association, and which said sum of fifteen ($15.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

40 Nineteenth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the 15th day of June, A. D. 1916, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established, and was then existing in the town of London, in the county of Laurel, and in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association as aforesaid, did on the 15th day of June, A. D. 1916, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment,

41 and while he was so employed and acting as such receiver and agent of the said national banking association as aforesaid, have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of fifty ($50.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last-mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing and, therefore, cannot here set forth), the said sum of fifty ($50.00) dollars then and there being the property of the said national banking association, and which said sum of fifty ($50.00) dollars, he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association and so having in his possession and under his control the said moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

42 Twentieth count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on or about the — day of ———, A. D. 1914, and between the 24th day of April, A. D. 1914, and the 13th day of August, A. D. 1914, the exact date being to the grand jurors aforesaid unknown, and within three years next before the finding of this indictment, at the said district of Kentucky, one Fred W. Weitzel was the receiver and agent of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county of Laurel, in the State and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That he, the said Fred W. Weitzel, so being then and there receiver and agent of the said national banking association,
43 as aforesaid, did on or about the — day of ———, A. D. 1914, and between the 24th day of April, A. D. 1914, and the 13th day of August, A. D. 1914, the exact date being to the grand jurors aforesaid unknown, and within three years next before the finding of this indictment, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment and while he was so employed and acting as such receiver and agent of the said national banking association as aforesaid, have, receive, and take into his possession and under his control certain moneys and funds of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of three thousand ($3,000.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last mentioned moneys and funds, respectively, the grand jurors aforesaid have no means of knowing, and, therefore, cannot here set forth), the said sum of three thousand ($3,000.00) dollars then and there being the property of the said national banking association, and which said sum of three thousand ($3,000.00) dollars he, the said Fred W. Weitzel, receiver and agent as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and under his control the said

moneys and funds last aforesaid, did, then and there, wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys and funds and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

THOS. D. SLATTERY,
United States Attorney.

44 (Back or cover of indictment.)

United States District Court, Eastern District of Kentucky.

THE UNITED STATES
vs.
FRED W. WEITZEL. } No. 1384.

A true bill.

TAYLOR ASBURY,
Foreman Grand Jury.

Filed Oct. 17, 1916.

J. W. MENZIES, *U. S. Clerk.*

Witnesses: John A. Best, D. F. Brown, R. C. Eversole, John Jody, A. E. Radert.

Indictment for Sec. 5209, R. S. U. S.—Embezzlement.

45 *General Demurrer.*

Filed June 11th, 1917.

Now comes the defendant, Fred W. Weitzel, and demurs to the indictment herein, and each and every count thereof separately, because the same, and neither of said counts, contain facts sufficient to constitute or charge the defendant with the commission of an offense against the United States.

A. E. STRICKLETT,
Attorney for Defendant.

46 *Transcript of Orders.*

Filed May 16th, A. D. 1917.

Proceedings had in the District Court of the United States for the Eastern District of Kentucky, at a regular term of court begun and held in the Federal Court Hall in the city of Covington, on Monday, April 2nd, A. D. 1917, and of our Independence the 141st year.

Court met. Present: Hon. A. M. J. Cochran, judge; J. W. Menzies, U. S. clerk; Thos. D. Slattery, U. S. attorney; R. C. Ford, U. S. marshal.

UNITED STATES, PLAINTIFF,
v.
FRED W. WEITZEL, DEFENDANT. } 3796

Be it remembered, that heretofore, to-wit, on the 17th day of October, A. D. 1916, an order was made and entered herein, being in words and figures as follows:

UNITED STATES
v.
FRED W. WEITZEL } 3796.

A true bill.

TAYLOR ASBURY, *Foreman.*

And on the same day, to-wit, on the 17th day of October, A. D. 1916, the following order was made and entered herein:

Order.

This day came the Hon. Thos. D. Slattery, U. S. attorney, and also came the defendant in discharge of the requirement of his bond, and having been formally arraigned, it was thereupon
47 demanded of him, the said Fred W. Weitzel, of and concerning the charges against him alleged in the indictment herein and he pleads that he is not guilty as charged therein.

Whereupon, on motion of the U. S. attorney, the court being advised, it is now ordered that this case be and the same is continued until the next regular term of court.

Order.

Entered April 2nd, 1917.

This cause coming on for hearing, came the U. S. attorney, and upon his motion, the court being advised, it is ordered that this case be and same is continued and transferred to Catlettsburg for trial on June 11, 1917. And the clerk of the court is directed to transmit to Catlettsburg the papers herein, together with the transcript of the orders that the case be properly docketed.

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, J. W. Menzies, clerk of the United States District Court, for the Eastern District of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of all orders herein in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said court at Covington, Ky., this 15th day of May, A. D. 1917, and of the independence of the United States of America the 141st year.

[SEAL.] J. W. MENZIES, *Clerk.*
By O. M. MITCHEL, *D. C.*

48 *Indictment.*

Ret. and filed at Covington, October 17, 1916, filed at Catlettsburg, May 16, 1917.

UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss.:

In the District Court of the United States of America in and for the Eastern District of Kentucky, held at Covington, Kentucky, at the October term, in the year of our Lord one thousand nine hundred and sixteen:

The grand jurors of the United States of America, impaneled, sworn, and charged to inquire for the body of the said eastern district of Kentucky, at the term aforesaid, and inquiring for that district, upon their oaths present:

That on the 13th day of August, A. D. 1914, in the said district of Kentucky, one Fred W. Weitzel was then and there the receiver of a certain national banking association, a body corporate, then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State and district aforesaid, which said national banking association was created and organized on the 27th day of September, 1888, under the laws of the United States, and continued to exist and do business under the said laws from said date to the 2nd day of April, 1914; that on or about the said 2nd day of April, 1914, the said national banking association was declared insolvent and closed by order of the Comptroller of the Currency of the United States; and that on or about the 9th day of April, 1914, the said Fred W. Weitzel was duly appointed by the said Comptroller of the Currency as receiver of the said national banking association; and that the said Fred W. Weitzel accepted the said appointment as such receiver of the said national banking association, and pursuant to his appointment, took possession and custody of the moneys, funds, and assets of the said national banking association and assumed charge of its affairs;

49 That he, the said Fred W. Weitzel, so being then and there receiver of the said national banking association, as aforesaid, did, on the 13th day of August, A. D. 1914, at the said town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, by virtue of his said office and employment, and while he was so employed and acting as such receiver of the said national banking association as aforesaid, have, receive, and take into his possession and custody and under his control certain moneys, funds, and assets of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of three thousand ($3.000.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last-mentioned moneys, funds, and assets, respectively, the grand jurors aforesaid have no means of knowing and therefore cannot here set forth), the said sum of three thousand ($3,000.00) dollars then and there being the property of the

said national banking association and which said sum of three thousand ($3,000.00) dollars he, the said Fred W. Weitzel, receiver as aforesaid, held for and in the name and on account of the said national banking association, and so having in his possession and custody and under his control the said moneys, funds, and assets last aforesaid, did then and there wilfully, knowing, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys, funds, and assets and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

50 Second count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That on the 8th day of June, A. D. 1916, in the said district of Kentucky, one Fred W. Weitzel was then and there the receiver of a certain national banking association, a body corporate then and there known and designated as The First National Bank of London, in the town of London, in the county of Laurel, in the State and district aforesaid, which said national banking association was created and organized on the 27th day of September, 1888, under the laws of the United States, and continued to exist and do business under the said laws from said date to the 2nd day of April, 1914; that on or about the said 2nd day of April, 1914, the said national banking association was declared insolvent and closed by order of the Comptroller of the Currency of the United States; and that on or about the 9th day of April, 1914, the said Fred W. Weitzel was duly appointed by the said Comptroller of the Currency as receiver of the said national banking association; and that the said Fred W. Weitzel accepted the said appointment as such receiver of the said national banking association, and, pursuant to his appointment, took possession and custody of the moneys, funds, and assets of the said national banking association, and assumed charge of its affairs;

That he, the said Fred W. Weitzel, so being then and there receiver of the said national banking association, as aforesaid, did, on the 8th day of June, A. D. 1916, at the said town of London, in the county of Laurel, in the State of Kentucky and district
51 aforesaid, by virtue of his said office and employment and while he was so employed and acting as such receiver of the said national banking association as aforesaid, have, receive, and take into his possession and custody and under his control certain moneys, funds, and assets of the said national banking association, to a large amount and of great value, to wit, to the amount and of the value of fifty ($50.00) dollars (the particular kinds, descriptions, numbers, amounts, and values of which last-mentioned moneys, funds, and assets, respectively, the grand jurors aforesaid have no means of

knowing, and, therefore, cannot here set forth), the said sum of fifty ($50.00) dollars then and there being the property of the said national banking association, and which said sum of fifty ($50.00) dollars, he the said Fred W. Weitzel, receiver as aforesaid, held for and in the name and on account of the said national banking association and so having in his possession and custody and under his control the said moneys, funds, and assets last aforesaid, did then and there wilfully, knowingly, wrongfully, unlawfully, feloniously, and with intent to injure and defraud the said national banking association, embezzle the said moneys, funds, and assets and convert the same to his own use;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

THOS. D. SLATTERY,
United States Attorney.

52 (Back or cover of indictment.)

United States District Court, Eastern District of Kentucky.

THE UNITED STATES
vs.
FRED W. WEITZEL. } No. 1386.

Indictment for sec. 5209, R. S. U. S.—Embezzlement.
A true bill.

TAYLOR ASBURY, *Foreman Grand Jury.*

Filed Oct. 17, 1916.

J. W. MENZIES, *U. S. Clerk.*

Witnesses: John A. Best, D. F. Brown, R. C. Eversole, John Jody, A. E. Radert.

53 *Demurrer.*

Filed June 11, 1917.

Now comes the defendant, Fred W. Weitzel, and demurs to the indictment herein, and each and every count thereof separately because same, and neither of said counts, contain or charge the defendant with commission of an offense against the United States.

A. E. STRICKLETT,
Attorney for defendant.

Order.

Entered June 11th, 1917, by A. M. J. Cochran, judge.

This day came the defendant and filed demurrer herein to the indictment and each paragraph thereof. Whereupon, came the United States attorney, and, on his motion, the court being advised, it is

now ordered that this cause be and same is consolidated with the case of United States vs. Fred W. Weitzel, No. 1384.

54 *Transcript of orders.*

Filed May 16th, 1917.

Proceedings had in the District Court of the United States for the Eastern District of Kentucky at a regular term begun and held in the Federal Court Hall, in the city of Covington, on Monday, April 2nd, A. D. 1917, and of our Independence the 141st year.

Court met. Present: Hon. A. M. J. Cochran, judge; J. W. Menzies, U. S. clerk; Thos. D. Slattery, U. S. attorney; R. C. Ford, U. S. marshal.

UNITED STATES, PLAINTIFF,
v.
FRED W. WEITZEL, DEFENDANT. } 3797.

Be it remembered that heretofore, to wit, on the 17th day of October, A. D. 1916, an order was made and entered herein, being, in words and figures, as follows:

UNITED STATES
v.
FRED W. WEITZEL. } 3797.

A true bill.

TAYLOR ASBURY, *Foreman.*

And on the same day, to wit, on the 17th day of October, A. D. 1916, the following order was made and entered herein:

Order.

This day came the Hon. Thos. D. Slattery, U. S. attorney, and also came the defendant in discharge of the requirement of his bond, and having been formally arraigned it was thereupon demanded of
55 him, the said Fred W. Weitzel, of and concerning the charges against him alleged in the indictment herein, and he pleads that he is not guilty as charged therein.

Whereupon, on motion of the U. S. attorney, the court being advised, it is now ordered that this cause be, and the same is, continued until the next regular term of court.

Order.

Entered April 2, 1917.

This cause coming on for hearing, came the U. S. attorney and, upon his motion, the court being advised, it is ordered that

this case be, and the same is, continued and transferred to Catlettsburg for trial on June 11, 1917. And the clerk of the court is directed to transmit to Catlettsburg the papers herein, together with the transcript of the orders, that the case may be properly docketed.

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky.

I, J. W. Menzies, clerk of the United States District Court for the eastern district of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of all orders herein in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said court at Covington, Ky., this 15th day of May, A. D. 1917, and of the independence of the United States of America the 141st year.

[SEAL.] J. W. MENZIES, *Clerk.*
By O. M. MITCHELL, *D. C.*

56 *Indictment.*

Ret. and filed at Covington, October 17, 1916. Filed at Catlettsburg, May 16, 1917.

UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

In the District Court of the United States of America, in and for the Eastern District of Kentucky, held at Covington, Kentucky, at the October term, in the year of our Lord, one thousand nine hundred and sixteen.

The grand jurors of the United States of America, impaneled, sworn, and charged to inquire for the body of the said eastern district of Kentucky, at the term aforesaid, and inquiring for that district, upon their oaths present:

That on or about the ——— day of ———, A. D. 1914, the exact date being to the grand jurors aforesaid unknown, at the town of London, in the county of Laurel, in the State of Kentucky, and the district aforesaid, and within the jurisdiction of this court, one Fred W. Weitzel was the receiver and agent of a certain national banking association, to wit, The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London and county of Laurel, in the State of Kentucky and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States; and the said Fred W. Weitzel was then and there the

receiver and agent and in custody and control of the books, records,
and assets of the said national banking association, having
57 theretofore been duly appointed as such receiver and agent by
the said Comptroller of the Currency and was then and there
acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That the said Fred W. Weitzel, receiver and agent of the said national banking association, as aforesaid, on or about the ——— day of ———, A. D. 1914, the exact date being to the grand jurors aforesaid unknown, then and there made and transmitted to the Comptroller of the Currency of the United States of America a certain report of the condition of the said national banking association as of the close of business on the thirtieth day of June, in the year, 1914, according to a certain form theretofore prescribed by the Comptroller of the currency of the United States for the time being, which report was a report which it was then and there by law the duty of the said Fred W. Weitzel, receiver and agent of the said national banking association, to make and transmit to the said comptroller, in accordance with the provisions of Sec. 5234 of the Revised Statutes of the United States; and which said report was signed by the said Fred W. Weitzel, receiver and agent of the said national banking association as aforesaid;

And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Fred W. Weitzel, so being receiver and agent of the said national banking association as aforesaid, on or about the said ——— day of ———, A. D. 1914, the exact date being to the grand jurors aforesaid unknown, then and there, at the said town of London, in the county of Laurel, in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, and feloniously make a certain false entry in the said report, under the and heading of "Assets," in the words and figures following, to wit:

58 5. Additional assets coming into possession of receiver since
suspension (schedule A), total 1,047.17; which said entry, so made as aforesaid, then and there purported to show, and did in substance and effect indicate and declare, that the total amount of additional assets coming into possession of the receiver of the said national banking association since the suspension of the said national banking association, at the date of the said report, to wit, on the thirtieth day of June, 1914, was the sum of one thousand forty-seven and 17/100 ($1,047.17) dollars; whereas, in truth and in fact, the total amount of additional assets coming into possession of the receiver of the said national banking association since the suspension of the said national banking association, at the date of the said report, to wit, on the thirtieth day of June, 1914, was a different and much larger sum, to wit, the sum of four thousand forty-seven and 17/100 ($4,047.17) dollars; and that the said Fred W. Weitzel, so

being receiver and agent of the said national banking association as aforesaid, did then and there make the said false entry in the said report of the said national banking association as aforesaid, well knowing that the said entry was then and there false, with the intent in him, the said Fred W. Weitzel, receiver and agent as aforesaid, to deceive the said Comptroller of the Currency and other persons to the grand jurors aforesaid unknown;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

59 Second count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That on or about the — day of ———, A. D. 1914, the exact date being to the grand jurors aforesaid unknown, at the town of London, in the county of Laurel, in the State of Kentucky and the district aforesaid, and within the jurisdiction of this court, one Fred W. Weitzel was the receiver and agent of a certain national banking association, to wit, The First National Bank of London, in the town of London, in the county of Laurel, in the State of Kentucky, which said national banking association had been theretofore created, organized, and established and was then existing in the town of London, in the county of Laurel, in the State of Kentucky and district aforesaid, under the laws of the United States; the said national banking association being then and there in the process of liquidation and the winding up of its business and affairs, pursuant to proper orders theretofore duly made by the Comptroller of the Currency of the United States, and the said Fred W. Weitzel was then and there the receiver and agent and in custody and control of the books, records, and assets of the said national banking association, having been theretofore duly appointed as such receiver and agent by the said Comptroller of the Currency and was then and there acting as such receiver and agent under the direction of the said Comptroller of the Currency;

That the said Fred W. Weitzel, receiver and agent of the said national banking association, as aforesaid, on or about the — day of ———, A. D. 1914, the exact date being to the grand jurors aforesaid unknown, then and there made and transmitted to the Comptroller of the Currency of the United States of America a cer-
60 tain report of the condition of the said national banking association, as of the close of business on the thirtieth day of September, in the year 1914, according to a certain form theretofore prescribed by the Comptroller of the Currency of the United States for the time being, which report was a report which it was then and

there by law the duty of the said Fred W. Weitzel, receiver and agent of the said national banking association, to make and transmit to the said comptroller, in accordance with the provisions of section 5234 of the Revised Statutes of the United States; and which said report was signed by the said Fred W. Weitzel, receiver and agent of the said national banking association as aforesaid;

And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Fred W. Weitzel, so being receiver and agent of the said national banking association as aforesaid, on or about the said — day of ———, A. D. 1914, the exact date being to the grand jurors aforesaid unknown, then and there, at the said town of London, in the county of Laurel, in the State and district aforesaid, did wilfully, knowingly, wrongfully, unlawfully, and feloniously make a certain false entry in the said report, under the heading of "disposition of assets," and under the subheading, "Amount collected by receiver to date," in the words and figures following, to wit:

10. From additional assets acquired since suspension (Schedule E), total $2,416.76; which said entry, so made as aforesaid, then and there purported to show, and did in substance and effect indicate and declare, that the total amount collected from additional assets acquired since the suspension of the said national banking association, by the said receiver of the said national banking association,
61 at the date of the said report, to wit, on the thirtieth day of September, 1914, was the sum of two thousand four hundred sixteen and 76/100 ($2,416.76) dollars; whereas, in truth and in fact, the total amount collected from additional assets acquired since the suspension of the said national banking association, by the said receiver of the said national banking association, at the date of the said report, to wit, on the thirtieth day of September, 1914, was a different and much larger sum, to wit, the sum of five thousand four hundred sixteen and 76/100 ($5,416.76) dollars; and that the said Fred W. Weitzel, so being receiver and agent of the said national banking association as aforesaid, did then and there make the said false entry in the said report of the said national banking association as aforesaid, well knowing that the said entry was then and there false, with the intent in him, the said Fred W. Weitzel, receiver and agent as aforesaid, to deceive the said Comptroller of the Currency and other persons to the grand jurors aforesaid unknown;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

THOS. D. SLATTERY,
United States Attorney.

62 (Back or cover of indictment.)

United States District Court, Eastern District of Kentucky.

THE UNITED STATES
vs.
FRED W. WEITZEL. } No. 1387.

Indict for sec. 5209, R. S. U. S.—False entries in reports.
A true bill.

TAYLOR ASBURY,
Foreman, Grand Jury.

Filed Oct. 17, 1916.

J. W. MENZIES,
U. S. Clerk.

Witnesses: A. E. Radert, John Jody, R. C. Eversole, B. F. Brown, John A. Best.

63 *Demurrer.*

Filed June 11th, 1917.

Now comes the defendant, Fred W. Weitzel, and demurs to the indictment herein and each and every count thereof because the same and neither of said counts contain facts sufficient to constitute or charge the defendant with the commission of an offense against the United States.

A. E. STRICKLETT,
Atty. for Defendant.

Order.

Entered June 11th, 1917, by A. M. J. Cochran, Judge.

This day came the defendant and filed demurrer herein to the indictment and each paragraph thereof. Whereupon came the United States attorney, and on his motion, the court being advised, it is now ordered that this cause be and same is consolidated with the case of United States vs. Fred W. Weitzel, No. 1384.

64 *Opinion.*

Filed June 11, 1917.

These consolidated causes are before me on defendant's demurrers to the indictments. The sufficiency thereof depends on the question whether a receiver of a national banking association, appointed by

the comptroller under the statutory provisions authorizing him to make such appointments is an agent of such an association under Section 5209, U. S. Rev. Stat. If he is not, it is not claimed that the indictments are good.

It will be noted that the section does not cover every person who is entrusted with the funds and assets of a national banking association, but six different classes of persons sustaining a certain relation to the association and who, by virtue of such relation, may have custody and possession thereof. Unless then a receiver, so appointed, comes within these classes he is not covered by the section. It is not claimed that he comes within any of them except the last. He does not come within it because he is not appointed by the banking association but by the comptroller. The word "agent" itself implies that he is appointed by the association. No one can be said to be the agent of another unless he has been chosen expressly or impliedly to act for him and on his behalf. It is a case also for the application of the maxim "Noscitur a socius." As to each of the five other classes the relation is brought about by the act of the Association.

The receiver of such an association is a public officer and
65 not an agent of the association. This is so, notwithstanding he hold the assets of the association in trust for the benefit of it, its stockholders and creditors. It is hardly conceivable that if Congress by section 5209 had intended to cover a receiver that it would not have named him expressly. It provided in the same legislation for the appointment of a receiver by the comptroller and also for the appointment of an agent by the shareholders of the association in a certain contingency. Such an agent comes within the description of section 5209 and a receiver does not.

The demurrers are sustained and each of the indictments quashed and dismissed.

A. M. J. COCHRAN, *Judge.*

June 11, 1917.

Order.

Entered June 11, 1917, by A. M. J. Cochran, Judge.

This day came defendant by counsel and produced and filed demurrer to the indictments and each and every count thereof. The court heard argument upon said demurrers and being fully advised, files its written opinion herein. It is therefore ordered and adjudged by the court that the demurrers be and they are each sustained in the consolidated causes Nos. 1384, 1386, and 1387, for the reasons set out in the written opinion filed herein, to which ruling of the court the United States by its attorney objects and excepts.

66 *Petition for writ of error.*

Filed July 3, 1917.

Now comes Thos. D. Slattery, United States attorney within the Eastern District of Kentucky, for and on behalf of the United States, the plaintiff herein, and says:

That on or about the 11th day of June, 1917, this court entered judgment herein in favor of the defendant and against the plaintiff, the United States of America, in which judgment and proceeding had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, the plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

THOS. D. SLATTERY,
United States Attorney.

67 *Assignment of errors.*

Filed July 3", 1917.

The plaintiff in this action, the United States of America, by its attorney, Thomas D. Slattery, United States attorney for the Eastern District of Kentucky, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers exist:

First. That the court erred in sustaining the demurrers of defendant to indictments numbered 1384, 1386, and 1387, consolidated herein.

Second. The court erred in holding as a matter of law that the receiver of a national banking association does not come within the provisions of section 5209 of the Revised Statutes of the United States.

Third. The court erred in holding as a matter of law that the word "Agent," as used in section 5209 of the Revised Statutes of the United States, does not include the receiver of a national banking association.

Fourth. The court erred in holding as a matter of law that the receiver of a national banking association is not the agent of such association within the purpose and meaning of section 5209 of the Revised Statutes of the United States.

Fifth. The court erred in quashing and dismissing the indictment herein.

68 Wherefore, the plaintiff prays that the judgment of the court be reversed.

THOS. D. SLATTERY,
United States Attorney for the Eastern District of Kentucky.

Order.

Entered by A. M. J. Cochran, Judge, July 3rd, A. D. 1917.

This 3rd day of July, 1917, comes the plaintiff, the United States of America, by Thos. D. Slattery, United States attorney within the eastern district of Kentucky, and files herein and presents to the court his petition, praying for the allowance of a writ of error, and assignment of errors intended to be urged by him; praying also that a transcript of the record and proceedings and the papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and such other and further proceedings may be had as are proper in the premises.

On consideration whereof, the court allows the writ of error.

A. M. J. Cochran,
United States Judge, Eastern District of Kentucky.

69 *Præcipe for transcript of record.*

Filed July 3rd, 1917.

To J. W. Menzies, *Clerk of said Court:*

You will please make transcripts of the following portions of the papers and records in the above-styled case.

1. The indictments Nos. 1384, 1386, 1387, consolidated.
2. The demurrer filed to the indictments consolidated.
3. The opinion of the court sustaining the demurrer to the indictments consolidated.
4. The judgment of the court.
5. All orders made and entered in this case.
6. Assignment of errors.
7. Application for writ.
8. Order allowing the writ.
9. Citation.

Thos D. Slattery,
United States Attorney.

I hereby, this 30th day of June, 1917, accept personal service of the præcipe on behalf of Fred W. Weitzel, defendant.

A. E. Strickleit,
Attorney for Defendant.

70 *Writ of error.*

Issued July 3rd, 1917.

United States Supreme Court, United States of America.

The President of the United States to the honorable the judge of the District Court of the United States for the Eastern District of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before

you, or some of you, between the United States, plaintiff in error, and Fred W. Weitzel, defendant in error, a manifest error hath happened, to the great damage of the said United States, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first day of August next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

71 Witness the honorable Edward D. White, Chief Justice of the United States, the 3rd day of July, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States of America the one hundred and forty-first year.

[SEAL.] J. W. MENZIES,
Clerk of the District Court of the United States.

Allowed by
A. M. J. COCHRAN,
United States District Judge.

72 *Clerk's certificate.*

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky.

I, J. W. Menzies, clerk of the United States District Court in and for the Eastern District of Kentucky, at Catlettsburg, do hereby certify that the foregoing 71 pages contain a full, true, and complete transcript of the record in the case of United States of America, as plaintiff in error, against Fred W. Weitzel, defendant in error, as the same appears from the records and files of this office and as called for by the praecipe for record filed in this case.

Witness my hand as clerk and the seal of said court, at Catlettsburg, this 7th day of July, A. D. 1917, and of our Independence the 142nd year.

[SEAL.] J. W. MENZIES, *Clerk.*

73 United States District Court, Eastern District of Kentucky, Catlettsburg.

1384 *Original citation.*

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

To Fred W. Weitzel, greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden in the city of Washington on the 1" day of August, next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Kentucky, wherein the United States is plaintiff in error and Fred W. Weitzel is defendant in error, to show cause, if any there is, why the judgment rendered against the said plaintiff, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand as judge of the said District Court and seal of said court this 3 day of July, 1917.

A. M. J. COCHRAN,
Judge of United States Court,
Eastern District of Kentucky.

I hereby accept due personal service of the citation in behalf of Fred W. Weitzel, defendant in error, this 9th day of July, 1917.

FRED W. WEITZEL,
By A. E. STRICKLETT,
His Attorney.

(Indorsement on cover:) File No. 26,034. E. Kentucky D. C., U. S. Term No. 567. The United States, plaintiff in error, vs. Fred W. Weitzel. Filed July 11th, 1917. File No. 26,034.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
FRED W. WEITZEL. } No. 567.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and in accordance with the provisions of the Criminal Appeals Act, 34 Stat. 1246, moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

Defendant was the *receiver* of the First National Bank of London, Kentucky. He was indicted in the District Court of the United States for the Eastern District of Kentucky for embezzling certain funds and making false entries in certain reports required by law to be furnished to the Comptroller of the Currency while acting as such receiver, in violation of section 5209 of the Revised Statutes, which provides, *inter alia*, that:

> Every * * * *agent* of any [national banking] association who embezzles, ab-

> stracts, or willfully misapplies any of the moneys, funds, or credits of the association; * * * or who makes any false entry in any * * * report * * * of the association, with intent * * * to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association * * * shall be guilty of a misdemeanor, and shall be imprisoned * * *.

The district court sustained demurrers to the indictments, holding, among other things, that a *receiver* of a national bank appointed by the proper authority of the Government *is not an agent* of the bank within the meaning of section 5209.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

JANUARY, 1918.

O

INDEX AND SUMMARY.

42801—18——1

CITATIONS.

CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
FRED W. WEITZEL.
No. 567.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

STATEMENT.

The defendant in error was indicted in the District Court of the United States for the Eastern District of Kentucky for embezzlement of the moneys, funds and credits of a national banking association in violation of the provisions of Section 5209 of the Revised Statutes of the United States. A demurrer to this indictment was sustained by the lower court, and the ruling is brought to this Court for review under the Criminal Appeals Act of March 2, 1907, c. 2564 (34 Stat. 1246).

The First National Bank of London, Ky., was duly organized under the national banking laws and authorized to commence the business of banking on September 27, 1888. This bank continued to transact business until April 2, 1914, when it was closed by order of the Comptroller of the

Currency, and its affairs were placed in the hands of National Bank Examiner W. P. Kinchloe as temporary receiver. On April 9, 1914, the Comptroller of the Currency appointed Fred W. Weitzel, defendant in error herein, as permanent receiver of the association. Pursuant to such appointment, said Weitzel forthwith took charge of the assets of the association and continued to act as receiver thereof until July 19, 1916, upon which date his resignation was tendered and accepted.

On October 17, 1916, three indictments were returned against Weitzel under Section 5209 of the Revised Statutes, which provided as follows:

> Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association;

> and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

The indictments charged in various counts of similar tenor that certain moneys, funds, and credits of the association came into his possession by virtue of his office and employment as receiver and agent of the said national banking association, which said moneys, funds and credits he embezzled and converted to his own use and benefit. (Record, 2–32.)

These indictments were held demurrable by the District Court solely on the ground that the receiver of a national banking association is not an agent of such association within the meaning of said Section 5209 of the Revised Statutes.

THE MOTION TO DISMISS.

Defendant in error has filed a motion to dismiss on the ground that the Supreme Court has not jurisdiction, inasmuch as the case does not come within the provision of Section 238 of the Judicial Code, and that the writ of error should have been to the Circuit Court of Appeals as provided in Section 128 of the Judicial Code.

The contention is based on air. The writ of error to the United States District Court is sued out in this case under the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564 (34 Stat. 1246),

claims belonging to it and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.

A receiver may also be appointed by the Comptroller of the Currency to wind up the affairs of the bank in the following cases:

If cancellation of stock paid for reduces the capital below the minimum required by law (Sec. 5141);

In case of deficiency of surplus in certain banks (Sec. 5151);

If the bank's reserve falls below the required amount (Sec. 5191);

If a bank organized in the cities named in Sec. 5191 fails to select a bank in New York to redeem its notes or fails to redeem its notes (Sec. 5195);

If the bank loans on its own shares or purchases its own shares (Sec. 5201);

If the capital is impaired (Sec. 5205);

If bank officers, clerks or agents certify checks illegally (Sec. 5208).

The Act of June 30, 1876, c. 156 (19 Stat. 63), section 1, provided for the appointment of a receiver as follows:

> That whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a national banking association he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes.

The Act of March 29, 1886, c. 28 (24 Stat. 8), provided that under certain conditions the receiver of a bank might purchase real or personal property on which the bank held a mortgage or pledge.

By Revised Statutes, Sec. 5238, it is provided that the expenses of a receivership are to be paid out of the bank's assets:

> All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof.

(2) THE DUTY OF A NATIONAL BANK RECEIVER.

The duty of the receiver is set forth in *Bank* v. *Kennedy* (1872), 17 Wall. 19, 22, 23, as follows:

> His very appointment makes it his duty to collect the assets and debts of the association. With regard to ordinary assets and debts no special direction is needed; no unusual exercise of judgment is required. They are to be collected of course; that is what the receiver is appointed to do.

The chief duty of the receiver being to collect the assets of the bank and to convert the same into cash as expeditiously as possible, in the performance of these duties it is common knowledge that it may be necessary for the receiver—

To employ such competent force of employees, assistants, and counsel, and incur such expenses as may be necessary in carrying out his functions;

To bring or defend suits;

To allow debtors of the bank to offset deposit balances and other claims against balances due to the bank;

To sell property of the bank or compromise bad or doubtful debts on permission of the court; and to accept assets of other kinds in payment of or in lieu of notes or bills receivable held by the bank, and to administer such new assets;

To sell securities held as collateral under the terms of the agreement by which the collateral is held;

In certain cases to use and invest funds of the bank to purchase property in order to protect equities owned by the bank (See Act of March 29, 1886, *supra*);

To act in the affairs of debtors to the bank in such manner as a creditor may usually act;

A receiver may, with the consent of the Comptroller, pay off incumbrances and remove clouds to the title, when a receiver has legal title to any property, whether real or personal, and such property is subject to an incumbrance such as unpaid taxes, a mortgage, etc.

(3) THE APPOINTMENT OF A RECEIVER DOES NOT WORK A DISSOLUTION OF THE BANK.

The appointment of a receiver by the Comptroller of the Currency to wind up the affairs of a national bank does not work its dissolution or affect suits pending against it, or incapacitate it from suing or being sued. Its corporate existence continues after the appointment of a receiver and until its affairs have been finally wound up. In *Chemical National Bank* v. *Hartford Deposit Company* (1896), 161 U. S. 1, this Court said (p. 7):

> It thus appears that by the terms of the statutes the corporation continues, notwithstanding the appointment of a receiver, if its corporate life has not been extinguished by lapse of time, by any provision of its articles, by any action of its stockholders, or by any

> judgment of forfeiture. The receiver is indeed appointed to close up the association; that is to say, to wind up its business, get in its assets, and pay its debts, and, if need be, to enforce the personal liability of its shareholders for all its "contracts, debts, and engagements"; but the corporation lingers while this is being done, and on occasion, when the receiver has discharged his duty with the satisfactory results enumerated and assets remain, an agent may be chosen, who may sue and be sued in the name of the association in the conduct of the final liquidation. Of course when insolvency is declared the corporation is incapacitated from doing any new business. It has ceased to be a going concern, but it still survives for the purpose of the discharge of its liabilities and the final distribution of its remaining assets when that has been accomplished. No refinement of construction leads to any other result, and numerous decisions preclude further discussion.

In *Bank of Bethel* v. *Pahquioque Bank* (1871), 14 Wall. 383, 400, the effect of the appointment of a receiver is thus described:

> Beyond doubt the appointment of a receiver supersedes the power of the directors to exercise the incidental powers necessary to carry on the business of banking, as the receiver is required to take possession of the books, records, and assets of every description of the association, and from that moment

> the association is forbidden to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, but the corporate franchise of the association is not dissolved, and the association, as a legal entity, continues to exist. * * *

In *Rosenblatt* v. *Johnston* (1881), 104 U. S. 462, 463, it is said that the bank's "property and assets, in legal contemplation, still belong to the bank, though in the hands of a receiver, to be administered under the law. The bank did not cease to exist on the appointment of the receiver."

A receivership may be of a temporary or provisional nature, and may last only long enough to satisfy the Comptroller that the bank is not insolvent, or that the facts do not present a case for a receiver as provided by the statute—see *Jackson* v. *Fidelity & Casualty Co. of New York* (C. C. A. 5th Circ. 1896), 75 Fed. 359, 364—and the interruption to the ordinary business of the bank may therefore be of a purely temporary nature.

(4). THE RECEIVER REPRESENTS THE BANK.

In *Case* v. *Terrell* (1870), 11 Wall. 199, it was held that the receiver of a national bank represents the bank, its stockholders, and creditors, and that neither he nor the Comptroller of the Currency can subject the Government to the jurisdiction of the ordinary courts to determine the conflicting claims of the United States and other creditors inthe hands of such a bank. In the course of the opinion,

Mr. Justice Miller, speaking for the Court, said (p. 202):

> We are quite at loss to know on what principle the jurisdiction in the present case is asserted, for the briefs for the appellees are devoted wholly to the merits of the controversy. But we must suppose that it is claimed on the ground that the receiver and comptroller, both of whom appeared and answered the bill, represent the United States, and can subject the Government to the jurisdiction of the court.
>
> *As to the receiver, the claim, if any such be made, is not worth serious consideration. He represents the bank, its stockholders, its creditors, and does not in any sense represent the Government.* [Italics ours.]

In *Kennedy* v. *Gibson* (1869), 8 Wall. 498, 506, it was said:

> The receiver is the statutory assignee of the association and is the proper party to institute all suits. * * * He represents both the creditors and the association.

II.

Revised Statutes, section 5209, was intended to cover the whole ground of defalcations which might be committed by all those who might have any connection with, or control over, the assets, funds, credits, books and papers of a national bank.

In the first place, it should be particularly noted that although the National Bank Act was passed in 1863—55 years ago—this case is the first instance, so far as the reports show, in which the contention

has ever been raised that an embezzling national bank receiver was not punishable under the Act, like any other embezzling representative of the bank. Since it would strain the credulity of the hardiest optimist as to human nature to believe that this is the first instance of a dishonest bank receiver, it would seem that the point would have been taken by some keen attorney during these 55 years "if it had been supposed by anyone that such legislation" failed to provide for such prosecution.

As was said (although in a different connection) by the dissenting Justices (Harlan, Gray, White, and McKenna) in *Fairbanks* v. *United States* (1901), 181 U. S. 283, 323:

> It is said that the question of power never was presented for judicial determination prior to the present case, and therefore this court is at liberty to determine the matter as if now for the first time presented. But the answer to that suggestion is that, in view of the frequent legislation by Congress and its enforcement for nearly a century, the question must have arisen if it had been supposed by anyone that such legislation infringed the constitutional rights of the citizen.

Embezzlement by a receiver falls squarely within the evil at which Revised Statutes, Section 5209, was aimed, and the statute should be so construed as to effectuate its evident intent.

The statute punishes the acts of three classes of persons: (*a*) President, director, cashier, teller; (*b*) clerk; (*c*) agent.

The first class (*a*) are referred to in the section as "officers," for it provides that "every person who with like intent aids or abets any *officer*, clerk, or agent in any violation of this section," etc. These three classes of persons were clearly intended to include every person acting for the bank who would have any control over its funds, credits, books, or papers.

The end at which this section was directed was well expressed by the Supreme Court of Massachusetts in one of Daniel Webster's most famous criminal cases, *Commonwealth* v. *Wyman* (1844), 8 Metcalf, 247, in which, construing another embezzlement statute, it said (p. 252):

> And against whom was the act intended thus to guard the property of a bank and its depositors, but against those whose connexion with the bank was such that they were either entitled to the custody of the property, or by their situations were brought in continual contact with it? Against those peculiarly exposed to the temptation, and over whom, therefore, a strong arm was to be held; and this would necessarily include all its officers, from the highest to the lowest * * *.
>
> (P. 253:) Being within the mischief, they are intended to be reached by the remedy.

In *State* v. *Barter* (1879), 58 N. H. 604, the court, construing an embezzlement statute penalizing "any officer, agent, or servant of any corporation," said (p. 605):

> The meaning of these comprehensive terms is not restricted by authorities relating to

> statutes of a narrower purpose. * * * Officer, clerks, servants, and agents, by virtue of their employment, having property of others rightfully in their possession, and converting it, not by a technical trespass, *but in violation of a trust reposed in them*, had been held not guilty of larceny on account of the lawfulness of their possession. The statute was designed to correct the evil introduced by the decisions in such cases. And the evil of embezzlement by agents was not confined to instances in which the fiduciary relation was of long duration, or was accompanied by compensation, or a certain measured extent, exclusiveness, or subordination of service.

In *Wynegar* v. *State* (1901), 157 Ind. 577, 579, 580, the court, construing an embezzlement statute, said:

> The term agent is one of wide signification. * * * The purpose intended by section 2022, *supra*, would seem to be, to embrace all other persons who voluntarily assume to another a relation of trust and confidence. * * *

In *Clement* v. *Canfield* (1856), 28 Vermont, 302, the court, through Redfield, C. J., held a lessee of a railroad an agent of the railroad corporation, within the meaning of the general railroad Act making the corporation and its agents liable for damages occasioned by want of fences and cattle guards:

> (P. 304:) The word agent is a very extensive term, and may be fairly applied to almost anyone who performs the office of

> another. This lessee, in one sense, certainly is the agent of the company. He is performing their functions, and clothed with their prerogatives, or he could not be allowed to take tolls, or freight and fare upon the road, or to run engines where he does, probably. In this sense he is the agent of the company. And, having, as such agent, acquired the powers and prerogatives of the company, is it anything unreasonable that he should, while exercising such powers and prerogatives, be subjected to the same liabilities which the law imposes upon the company and their agents who destroy property? But it is said that a lessee is not of the class of agents referred to in the statute. That the statute probably refers primarily to those agents of the company who are under their control, like engineers and conductors. But does not the very relation in which the term agent is used in this statute show that the legislature must have adopted that most extensive term for the very purpose of reaching any and all persons who might acquire the right to run the road, under the powers conferred upon the corporation? Any other construction would seem to be contrary to the fair use of the term agent, with reference to the subject matter.

The Government contends that the word "agent" in the first line of Revised Statutes, Section 5209, should, in order to effectuate the full purpose of the Act, be given as reasonable a construction as this Court gave to the word "agent" in the twelfth line of

the same section, in *United States* v. *Corbett* (1909), 215 U. S. 233. In that case, the question was whether the Comptroller of the Currency, who was given the power to appoint agents to examine the affairs of national banks, was himself an "agent" within the meaning of that part of the section which penalizes false entries "with intent * * * to deceive * * * any agent appointed to examine the affairs of any such association." This Court said, per White, J., that to hold otherwise

> (P. 241:) would do violence to the text of section 5209 and conflict with its context, and would, besides, frustrate the plain purpose which the section, as a whole, was intended to accomplish, especially if it be considered in the light of cognate provisions of the statute. * * * Indeed, the words "any agent" would seem to have been used in the broadest sense for the express purpose of excluding the possibility of the contention now made.
>
> (P. 242:) The rule of strict construction does not require that the narrowest technical meaning be given to the words employed in a criminal statute in disregard of their context and in frustration of the obvious legislative intent.

As Judge Brown said in *United States* v. *Jewett* (1897), 84 Fed. 143 (aff. in *Jewett* v. *United States* (1900), C. C. A., 1st Circ., 100 Fed. 832):

> *The protection afforded by the statute against embezzlement, abstraction, or willful misapplica-*

tion of the property of the association should be held, in the absence of reasons to the contrary, to continue as long as the necessity for such protection exists. [Italics ours.]

When Congress punished by the National-Bank Act embezzlement committed by a bank clerk—an employee who presumably has a very limited control over or connection with bank property, with very limited opportunities to embezzle—is it likely that Congress intended to omit punishing by the same act a receiver who has full charge of the whole property of the bank, with almost unlimited opportunity for embezzlement?

As pointed out in this brief *infra*, unless an embezzling receiver can be prosecuted under this Section 5209, there is no other Federal statute under which he can be indicted unless Section 97 of the Criminal Code is applicable to receivers (which seems more than doubtful, see *infra*, p. 29–33). But the penalty contained in Section 97 is only fine or imprisonment, or both, with no minimum penalty provided for, so that the lower court's decision will have this result: That a national-bank clerk may be indicted under a statute which affixes a minimum penalty of five years' imprisonment, whereas a national-bank receiver may be indicted in a Federal court (if at all) only under a statute which contains no minimum penalty and makes it possible for him to escape with a simple fine (Federal Criminal Code, Sec. 97).

The Government contends that it is the clear duty of this Court to so construe Section 5209 as to avoid any such unjust and ridiculous result.

As it is abhorrent to our system of jurisprudence that there should be a wrong without a corresponding remedy, so is it abhorrent to our conception of the principles of natural justice that the receiver of a national bank who possesses unrestrained control over its assets should stand immune from adequate punishment for violation of his trust, and should not be held to the same strict accountability as a bank officer or a clerk.

Congress could not have intended to leave so large a hole in the National Bank Act out of which dishonest and defaulting receivers could creep.

III.

A national bank receiver is not an officer of any court and has not the status of a judicial receiver. He is simply a liquidating agent provided for the bank by the statute. In accepting its charter, the bank accepts all the provisions of the National Bank Act, including the provision for appointment of such a liquidating agent or receiver; and when such a receiver is appointed as such an agent by the Comptroller, his appointment is impliedly authorized by the bank.

The lower court says in its decision (R. 34) that the receiver

> does not come within it because he is not appointed by the banking association, but by the comptroller. The word "agent" itself implies that he is appointed by the association. No one can be said to be the agent of another unless he has been chosen expressly or impliedly to act for him and on his behalf.

42801—18——4

It is undoubtedly true, as a general rule, that an agency implies some act of choice or consent by the principal. An agent, however, may be constituted either by express act, or by implication, or by ratification, or by acceptance of statutory conditions, or by operation of law (Mechem on Agency, 2d Ed., 1914, Sec. 26).

A corporation for certain purposes may be conclusively deemed to assent to the appointment by statute of an agent to accept service. *Old Wayne Life Association* v. *McDonough* (1907), 204 U. S. 8, 21, 22; *Simon* v. *Southern Railway* (1915), 236 U. S. 115, 130; *Pennsylvania Fire Insurance Co. of Philadelphia* v. *Gold Issue Mining & Milling Co.* (1917), 243 U. S. 93, 96.

There can be little doubt of the power of Congress to enact a valid law making the Comptroller of the Currency, or a designated national-bank examiner, or a duly appointed receiver the agent of any national bank for prescribed purposes within the general purview of the banking laws. And this is precisely what Congress has, in effect, done in providing for the appointment of a receiver to take charge of the affairs of a national bank in the event of its declared insolvency or of its violation of specified provisions of the banking laws.

It is well-established law that the charter of a corporation does not consist of the articles of the association alone, but of such articles taken in connection with the provisions of law contained in the special or general statute under which the organi-

zation is formed; and the corporation accepts all such provisions as part of its charter, which it may not question. See *Chicago R. I. & Pac. Ry. Co.* v. *Zernecke* (1902), 183 U. S. 582, 588; *Newburyport Water Co.* v. *Newburyport* (1904), 193 U. S. 561, 579; *Interstate Consolidated Street Ry. Co.* v. *Massachusetts* (1907), 207 U. S. 79, 84; *Alabama & V. Ry. Co.* v. *Odeneal* (1895), 93 Miss. 34; *Swedish-American Telephone Co.* v. *Fidelity & Casualty Co.* (1904), 208 Ill. 562; 70 N. E. 768.

Each national bank, therefore, in accepting its charter impliedly consents to the appointment of such an agent to act for it upon the happening of any of the stipulated contingencies, and it accordingly assents to the authorized acts of such receiver when duly appointed.

It is contended that because the person appointed by a court technically known to the common law as a "receiver" is an officer of the court and holds the property in *custodia legis*, therefore the "receiver" appointed under the National Bank Act has the same legal status, and is governed by the doctrines laid down by the courts relative to judicial receivers.

But the Government contends that the doctrines relative to judicial receivers are not in any way pertinent, and that the text books and cases which state broadly that a judicial receiver is not the agent of the corporation (see *Metz* v. *Buffalo, etc., R. R.* (1874), 58 N. Y. 61, 66; *State* v. *Hubbard* (1897), 58 Kansas, 797, 801), do not apply in any way to this statutory bank receiver.

The term "receiver," technically, as defined by all the leading textbooks, means a person appointed by a court (see High on Receivers, 4th Ed., 1910, sec. 1; Cyc. vol. 34, pp. 15–16; Amer. & Eng. Ency'l of Law, 2d Ed., vol. 23, p. 1060); and it should strictly and properly not be used to signify any one else. Unfortunately, the National Bank Act adopted this word which had acquired a technical, legal meaning, and used this word "receiver" simply in the sense of a person appointed by the Comptroller to act for the bank. If the statute, instead of saying in Section 5234, "The Comptroller of the Currency may forthwith appoint a receiver," had said that he might appoint "an agent," or a "superintendent," or a "liquidator," the attempt to apply to such an appointee judicial decisions which referred solely to court receivers would never have been made.

In New York, the banking law provides for the liquidation of bank affairs through the Superintendent of Banks, who may appoint special deputy superintendents to assist him in the duty of liquidation and distribution. In *Union Bank of Brooklyn* v. *Kanturk Realty Corporation* (1911), 72 N. Y. Misc. 96, 97, the court said:

> As he has the power to collect moneys, he also has the power to defend against counterclaims set up in suits for the collection of such moneys; and, if a verified counterclaim requires a verified reply, it necessarily follows that *the Legislature created the Superintendent or his deputy an agent of the corporation for this*

necessary step in the collection of the assets. [Italics ours.]

A distinction between a "chancery, or, as it is sometimes called, a common receiver," and a statutory receiver is taken in *Stokes* v. *Hoffman House* (1901), 157 N. Y. 554, 559; and referred to in *Quincy, Missouri, & Pacific R. R. Co.* v. *Humphreys* (1892), 145 U. S. 82, 97.

IV.

The functions and duties of a receiver are substantially the same as those of liquidating agent of the bank provided for impliedly under Revised Statutes, Section 5220, and expressly under Section 3 of the Act of June 30, 1876. Such a liquidating agent and a receiver, both represent the bank in its corporate capacity, and act for its benefit. A liquidating agent has been held by the courts to be indictable under Revised Statutes, Section 5209.

In the original National Bank Act—Act of February 25, 1863, c. 58 (12 Stat. 665), there was no express provision made for a voluntary dissolution of a national bank. Voluntary dissolution was first provided for in the Act of June 3, 1864, c. 106, Section 42 (13 Stat. 99. 112), now embodied in Revised Statutes, Section 5220, which provides that "Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock." No express statutory provision was thereby made (or anywhere else in the Revised Statutes) for a liquidating agent, but the power of the bank to employ such an agent was implied, see

Jewett v. *United States* (C. C. A., 1st Circ., Mar. 29, 1900), 100 Fed. 832, 838, *et seq.*, and cases cited.

In the *Jewett case*, it was held that a liquidating agent who was appointed in voluntary dissolution under Revised Statutes, Section 5220 (and not appointed under Sec. 3 of the Act of June 30, 1876, c. 156, 19 Stat. 63, referred to *infra*), was an "agent" within the meaning of Revised Statutes, section 5209 (the criminal section at issue in the case at bar).

> The next point made by Jewett is that Section 5209 of the Revised Statutes has no application to a bank in liquidation, or to an agent appointed to close its affairs. Clearly, both are within the letter of the statute, and within the mischief it was intended to remedy. Indeed, there would seem to be more ground for holding the terrors of the law over an agent who is in uncontrolled possession of the assets of an association, than over an officer who is at all times subject to the scrutiny of those who are about him or over him.

Later statutes, moreover, provide expressly for another liquidating agent, i. e., an agent to be appointed by the shareholders to take over the bank's affairs after the receiver has ended his duties. See Act of June 30, 1876, c. 156, Sec. 3 (19 Stat. 63), as amended by the Act of August 3, 1892, c. 360 (27 Stat. 345), and the Act of March 2, 1897, c. 354 (29 Stat. 600), quoted in full in Appendix A (pp. 41–45 of this brief).

In *McConville* v. *Gilmour, et al.* (1888), 36 Fed. 277, the status of such a liquidating agent was considered, the question being whether the Federal courts had jurisdiction of suits brought by such an agent (without regard to diversity of citizenship or the amount involved). The courts had already held that for the purposes of Federal jurisdiction a national-bank receiver was such an officer of the United States as could maintain a suit in a district court of the United States under the jurisdictional statutes. In the *McConville case*, the court decided that the liquidating agent was equally entitled to sue in a Federal court, and said (pp. 278, 279):

> Indeed, the "agent" is only the "receiver" under another name. * * * *Each of these administrative officials—the "receiver" and the "agent"—represent the bank in its corporate capacity, and neither of them is more or less than the other such a representative.* * * * Indeed, here there is scarcely any necessity for a substitution, except for the bare purpose of technical conformity, since the "receiver" and the "agent" are one and the same person, and either may, under the privileges of the statute, sue in his own name as "receiver" or "agent." [Italics ours.]

The same view of the status of a liquidating agent was taken in *Guarantee Co. of North Dakota* v. *Hanway* (C. C. A., 8th Circ., 1900), 104 Fed. 369, 372, in which the court, after noting that a receiver was, for jurisdictional purposes, an officer of the United States, said that a liquidating agent was also an offi-

cer of the United States in the same sense and for the same purposes:

> Now, a receiver is not an officer of the United States because the Nation has any pecuniary or other interest in his acts or omissions, but simply because an act of Congress authorizes his appointment, prescribes his duties, and designates the appointing power. By the same mark, a shareholder's agent is an agent and officer of the United States. The same act creates his office, authorizes his appointment, designates the appointing power, and imposes upon him the same duties. While at a certain stage in the proceedings for winding up the affairs of a national bank the power designated to appoint the agent may exercise its option to continue the receiver or to choose the agent, when that option has been exercised, and the agent has been appointed, he discharges the same duties as the receiver, and becomes the "agent and officer of the United States," in every sense in which the receiver is such an agent and officer.

In other words, the courts appear to hold that the functions of a liquidating agent and of a receiver are practically identical, and that if the receiver may sue in a Federal court, a liquidating agent may likewise so sue.

Let us consider the effect of Judge Cochran's decision in the case at bar upon a case like the *McConville case*. The plaintiff, McConville, was duly appointed as a receiver of an insolvent bank; the shareholders later appointed him as liquidating agent

under the provisions of the Act of June 30, 1876; McConville made application to have himself substituted as liquidating agent for the bank, in an action which he had commenced as receiver for the bank; and the court said: "Indeed, the 'agent' is only the 'receiver' under another name;" and held that the Federal court had jurisdiction of his suit. Now, here was the same individual, McConville. At one moment he was acting as receiver of a national bank, appointed by the Comptroller, and, according to Judge Cochran, could not be indicted under Revised Statutes, Section 5209; the next moment he became a "liquidating agent" appointed by the shareholders, and thereupon he became indictable under that section as an "agent." (See *Jewett* v. *United States* (C. C. A. 1900), 100 Fed. 832, *supra.*) Yet he had been judicially held to have substantially the same powers and duties as agent as he had when receiver; and his acts of embezzlement would have had as serious effects upon the bank in his first capacity as in his second.

Is it possible that Congress ever purposed, or that this Court is obliged to construe the word "agent" so as to bring about, such an illogical, unnecessary, and injurious result?

Suppose, in the above case, McConville embezzled $10,000 of the bank's money in his capacity as receiver, on March 6, 1888, and $10,000 more in his capacity as liquidating agent on March 7, 1888. For the latter crime, he would be subject to the penalty of a minimum term of imprisonment of five years

and a maximum term of 10 years (under Revised Statutes, Sec. 5209); but for the embezzlement as receiver he would, by Judge Cochran's decision in the lower court, either not be subject to any penalty at all under the Federal criminal laws, or else he might escape with a mere fine of $10,000 and no imprisonment at all, such being the possible penalty provided for in Section 97 of the Federal Criminal Code (if that section can and shall he held to apply, which is doubtful; see *infra*, p. 29–33). Section 97, in full, is as follows:

> Any officer connected with, or employed in, the Internal Revenue Service of the United States, and any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or other property of the United States, and any officer of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or assistant, whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States, be fined not more than the value of the money and property thus embezzled or converted, or imprisoned not more than ten years, or both.

This section was first enacted as the Act of February 3, 1879, c. 42 (20 Stat. 280)—16 years after

the first National Bank Act. It was clearly not intended to be the measure of punishment to be meted out to those who commit so serious a Federal crime as embezzlement of bank moneys by a receiver of a national bank; for the penalty was only a fine of not more than the value of the money or property embezzled *or* imprisonment for not more than 10 years, or both, there being a minimum penalty of three months (whereas the National Bank Act provides a minimum penalty of five years, and makes no provision for a fine). By the revision in the Criminal Code, Section 97, even the three months' minimum penalty is eliminated.

V.

A national-bank receiver is not an officer of the United States within the purview of Federal criminal statutes punishing crimes committed by such officers.

(1) A decision that a receiver is an officer of the United States within the purview of the Federal criminal laws will be attended by the following extraordinary results:

First. That from the year 1863 to the year 1879, an embezzling receiver of a national bank could not have been prosecuted under any Federal criminal statute; for it was not until the latter year that, by the Act of February 3, 1879, c. 42 (20 Stat. 280; now Section 97 of the Federal Criminal Code), it was first made a crime for an officer of the United States to embezzle any money or property which came into his possession or under

his control in the execution of his office. Prior to this Act of 1879, the only Federal embezzlement statutes as to public officers were the Act of August 6, 1846 (9 Stat. 59), and the Act of June 15, 1866, c. 123 (14 Stat. 65), and Revised Statutes, Section 5496, which only referred to embezzlement of "the public monies of the United States," which term does not include the corporate funds of national banks.

Second. That from the year 1876 to the year 1879, a liquidating agent of a national bank appointed under the Act of June 30, 1876, c. 156, Section 3 (19 Stat. 63), apparently could not have been prosecuted for embezzlement under any Federal criminal statute; for *Guarantee Company of North Dakota* v. *Hanway* (C. C. A. 8th Circ., Oct. 9, 1900), 104 Fed. 369, 372, held that such a liquidating agent is an officer of the United States "in every sense in which the receiver is such an agent and officer." If, therefore, both agent and receiver were officers of the United States, as that term is used in criminal statutes, then it was not until the passage of the Act of February 3, 1879, c. 42 (20 Stat. 280), *supra*, that they could either of them have been criminally liable under Federal law.

(2) Neither the manner of appointment, method of payment of salary, nor duration or tenure of office are such as to constitute a national-bank receiver an officer of the United States. His appointment is by the Comptroller of the Currency, and is not required to be approved by the Secretary of the Treasury

(Rev. Stat., Sec. 5234); he is paid out of the assets of the bank before distribution of the proceeds (Rev. Stat., Sec. 5238); and he is appointed for no definite time, and for no fixed statutory salary.

Such a receiver clearly does not come within the purview of the term "officer of the United States" as that term is construed in criminal statutes in *United States* v. *Hartwell* (1867), 6 Wall. 385; *United States* v. *Germaine* (1878), 99 U. S. 508, 510; *United States* v. *Mouat* (1888), 124 U. S. 303, 307; *United States* v. *Smith* (1888), 124 U. S. 525, 533; *Martin* v. *United States* (C. C. A., 8th Circ., 1909), 168 Fed. 198; *Scully* v. *United States* (1910), 193 Fed. 185; *United States* v. *Van Wert* (1912), 195 Fed. 974. For this reason, therefore, Judge Shiras, in the Circuit Court for the District of Nebraska, in *Thompson* v. *Pool* (1895), 70 Fed. 725, 727, 728, stated that if he were not controlled by a prior decision in the circuit, he should hold that a receiver was not an officer of the United States, even in a civil case, within the meaning of the jurisdictional statutes:

> I must say that, in view of the ruling of the Supreme Court in *U. S.* v. *Germaine*, 99 U. S. 508, and *U. S.* v. *Mouat*, 124 U. S. 303, 8 Sup. Ct. 505, it would seem clear that the holding in *Price* v. *Abbott* is based upon an untenable assumption, to wit, that an appointment of a receiver made by the comptroller can be deemed to be made with the approval of the Secretary of the Treasury, and therefore the

> receiver can be held to be an appointee of the Secretary, and therefore an officer of the United States, because appointed by the head of the department; it having been settled in *U. S.* v. *Germaine, supra*, that no one, although acting for the United States as its agent, can be deemed to be an officer thereof unless he holds his position by virtue of an appointment by the President, or by the head of a department, or by a court of law. The decisions in *Price* v. *Abbott*, at circuit, and in *U. S.* v. *Mouat*, seem to be in direct conflict, and if I deemed the question open for me for decision on its merits, I should be compelled to hold that, under the ruling in the cases cited, of *U. S.* v. *Germaine* and *U. S.* v. *Mouat*, a receiver is not an officer of the United States within the meaning of section 629 of the Revised Statutes, because he is an appointee of the comptroller, who is not the head of a department, and there is no statute which authorizes the Secretary of the Treasury to appoint a receiver, or to approve the appointment when made by the comptroller, and therefore a receiver can not be held to be an appointee of the head of the Treasury Department.

While the decision of Mr. Justice Gray in *Price, Receiver*, v. *Abbott* (1883), 17 Fed. 506, has been frequently cited in civil cases involving jurisdiction, it is doubtful if his reasoning would stand the test of the Supreme Court decisions in a criminal case involving the question whether a receiver is a constitutional officer of the United States.

If, therefore, it shall be held that a receiver is not such an officer within the purview of the criminal statutes, then there is now no law on the Federal statute books which will punish an embezzling bank receiver, unless he can be punished under the statute now in question, Revised Statutes, Section 5209; and if, on the other hand, it shall now be held that a receiver *is* such an officer, then from 1863 to 1879, there was no law on the Federal statute books under which he could have been punished for embezzlement.

VI.

The fact that for the limited purpose of suing in the Federal courts a national-bank receiver has been held to be an officer of the United States, as that term is used in statutes granting jurisdiction to Federal courts, is not incompatible with the status of the receiver as an agent of the bank. To this extent, he acts in a dual capacity.

Contention has been made that a national bank receiver can not, in law, be held to be an agent of the bank, because such receivers have been held for the mere purpose of jurisdiction of the Federal courts to be officers of the United States, as that term is used in certain jurisdictional statutes. But those making this contention overlook the fact that the very courts which so hold a receiver to be, for such limited purpose, an officer of the United States, also recognize the fact that he has in law a dual capacity, and that he represents the association, its stockholders and creditors as well. There seems to be nothing incompatible in these double functions.

Thus, in *Kennedy* v. *Gibson* (1869), 8 Wall. 498, while this Court said that (p. 504):

> The receiver is the agent of the United States, and according to the 56th section of the act [Act of June 3, 1864, 13 Stat. 116], this suit should have been conducted by their attorney.

But it is to be noted that it further termed "the receiver the statutory assignee of the association. * * * He represents both the creditors and the association" (p. 506):

> The claims of creditors may be proved before the comptroller, or established by suit against the association. Creditors must seek their remedy through the comptroller in the mode prescribed by the statute; they can not proceed directly in their own names against the stockholders or debtors of the bank. *The receiver is the statutory assignee of the association,* and is the proper party to institute all suits; they may be brought both at law and in equity, in his name, or in the name of the association for his use. *He represents both the creditors and the association,* and when he sues in his own name it is not necessary to make either a party to the suit. [Italics ours.]

And in *Price, Receiver,* v. *Abbott* (1883), 17 Fed. 506, Mr. Justice Gray, in the Circuit Court for the District of Massachusetts, well defined the dual capacity of such a receiver as follows (pp. 507–508):

> The receiver, indeed, in one aspect represents the bank, its stockholders, and its

> creditors; and neither he nor the comptroller of the currency represents the Government, so far as to have authority to waive its exemption from liability to suit. *Case* v. *Terrell*, 11 Wall. 199. But being appointed pursuant to an act of Congress to execute duties prescribed by that act, he is, in the execution of those duties, an agent and officer of the United States; and actions brought by him to recover assessments duly laid upon stockholders, and necessary to provide for the payment of the debts of the bank, are suits at common law brought by an officer of the United States suing under the authority of an act of Congress, of which this court has concurrent jurisdiction with the district court, without regard to the amount sued for.

It seems clear, however, that the decisions only go to the limited extent of holding a receiver to be an officer of the United States within the meaning of that term in certain special jurisdictional statutes. Thus, Revised Statutes, Section 563, cl. 4, gave the District Court jurisdiction in—

> all suits at common law brought by the United States, *or by any officer thereof*, authorized by law to sue.

So, Revised Statutes, Section 629, cl. 3, gave the Circuit Court jurisdiction in—

> all suits at common law where the United States, *or any officer thereof*, suing under the authority of an act of Congress, are plaintiff.

So, Revised Statutes, Section 380, require district attorneys to conduct—

> all suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States *or any of its officers or agents* shall be parties. * * *

In numerous cases arising under the above statutes, a receiver was held to be an officer of the United States within the purview of the particular statute. See *Gibson* v. *Peters* (1893), 150 U. S. 342; *In re Chetwood, petitioner* (1897), 165 U. S. 443; *Auten* v. *United States National Bank of New York* (1899), 174 U. S. 125; *Frelinghuysen* v. *Baldwin* (1882), 12 Fed. 395; *Hendee* v. *Connecticut & P. R. R. Co.* (1886), 26 Fed. 677; *Armstrong* v. *Trautman* (1888), 36 Fed. 275; *Stephens* v. *Bernays* (1890), 41 Fed. 401; *Thompson* v. *Pool et al.* (1895), 70 Fed. 725; *Speckart* v. *German National Bank et al.* (1898), 85 Fed. 12; *Murray* v. *Chambers* (1907), 151 Fed. 142.

There is nothing unusual, however, in one term having two distinct meanings in two different statutes (*Lamar* v. *United States* (1916), 240 U. S. 60, 65); and the best illustration of this fact is to be found in two consecutive cases in 124 U. S., in which in *United States* v. *Mouat*, page 303, a paymaster's clerk was held *not* to be an "officer of the Navy" within the meaning of the Act of June 30, 1876, c. 159 (19 Stat. 65), whereas in *United States* v. *Hendee*, page 309, a paymaster's clerk was held to be an "officer of the Navy" within the meaning of the Act of March 3, 1883, c. 97 (22 Stat. 473).

VII.

The opinion filed by the lower court contains no sufficient reasoning to establish the point decided. It holds that a receiver is a public officer and not an agent, but states the point as if it were axiomatic and needed no citation of authority or reason.

(1) The statement of the lower court to the effect that (R. 34)—

> It is hardly conceivable that if Congress by section 5209 had intended to cover a receiver that it would not have named him expressly. It provided in the same legislation for the appointment of a receiver by the comptroller and also for the appointment of an agent by the shareholders of the association in a certain contingency. Such an agent comes within the description of section 5209 and a receiver does not,

is not strictly accurate, if it be interpreted to mean that Congress in the original bank Act, from which 5209 is taken, provided for any agent to be appointed by the shareholders to wind up the bank. As pointed out *supra*, there was no such provision for such agent in the original bank Act—Act of February 25, 1863, c. 58 (12 Stat. 665)—since there was no provision at all made in that Act for voluntary dissolution of a national bank. Voluntary dissolution was first provided for in the Act of June 3, 1864, c. 106, Section 42 (13 Stat. 99, 112), now embodied in Revised Statutes, Section 5220, and no express statutory provision was made for a liquidating agent, named as such, until the Act of June 30, 1876 (19 Stat. 63).

Hence, in the year 1863, when the original of Revised Statutes, Section 5209, was passed as Section 52 of the Act of February 25, 1863, the word "agent," as used in that section could hardly be said to refer only to an official of the bank who was not even named in the statute. The reasoning of the lower court is therefore plainly defective.

If the word "agent," as used in the original Act of 1863, only referred to those persons named as agents of the bank in that Act itself, the word must be given a very restricted scope; for the only agents specifically provided for in that Act are as follows:

> SEC. 23 (yearly examination of bonds pledged). Such examination may be made by an *agent* of such association, duly appointed in writing for that purpose whose certificate before mentioned shall be of like force and validity as if executed by such president or cashier. [Italics ours].
>
> SEC. 32 (worn out, mutilated, and canceled notes to be burned in presence of 3 persons appointed by Secretary of Treasury, Comptroller, and Treasurer): * * * and in case such notes shall have been delivered to the Comptroller by an officer or *agent* of such association, then in the presence, also, of such officer or agent. * * * [Italics ours]

(2) Nor is the remark of the lower court that the case is one for the application of the maxim "*noscitur a sociis*" valid. It is clear that the statute refers to three different classes of persons—first, officers, (i. e., president, director, cashier, teller); second, clerks; and lastly, agents.

There is no logical reason why the word "agent" should be restricted in its meaning, but rather the whole intent and tenor of the Act would seem to show that Congress meant to penalize acts of embezzlement, and other criminal activities, in connection with the bank's assets when committed by anyone acting in behalf of the bank, whether by an agent constituted by express vote of the bank's stockholders or officers, or by an agent constituted by operation of law.

(3) The lower court says:

> It will be noted that the section does not cover every person who is entrusted with the funds and assets of a national banking association.

But this allegation is merely a restatement of the question which was before the court for decision.

(4) The court then proceeds to state that the section covers—

> six different classes of persons sustaining a certain relation to the association and who, by virtue of such relation, may have custody and possession thereof (viz, of the funds and assets).

This, also, is merely reiterated statement, with no supporting reasons given. Moreover, not six classes of persons are included, but only three—officers, clerks, agents.

The court then says:

> Unless, then, a receiver so appointed comes within these classes he is not covered by the section.

This, of course, is the question at issue. The Government claims that a receiver comes within the last class, viz, agent.

CONCLUSION.

It is respectfully submitted that the demurrers to the indictments were erroneously sustained and the judgment below should be reversed and the defendant ordered to stand for trial.

CHARLES WARREN,
Assistant Attorney General.

MARCH, 1918.

APPENDIX A.

Act of June 30, 1876, c. 156, sec. 3 (19 Stat. 63), as amended by the Act of August 3, 1892, c. 360 (27 Stat. 345), and the Act of March 2, 1897, c. 354 (29 Stat. 600).

SEC. 3. That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the share-

holders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the said association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall, by the vote of a majority of the stock in value and number of shares, determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided; and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller

of the Currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this Act be discharged from any and all liabilities to such association and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such

association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond. And in case any such agent so elected shall refuse to serve, or die, resign, or be removed, any shareholder may call a meeting of the shareholders of such association in the town, city, or village where the business of the said association was carried on, by giving notice thereof for thirty days in a newspaper published in said town, city, or village, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and shall have executed a bond to the shareholders conditioned for the faithful performance of his duties, in the penalty fixed by the shareholders at said meeting, with two sureties, to be approved by a judge of a court of record, and file said bond in the office of the clerk of a court of record in the county where the business of said association was carried on, he shall have all the rights, powers, and

duties of the agent first elected as hereinbefore provided. At any meeting held as hereinbefore provided administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or cestui que trust. The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

"First. To pay the expenses of the execution of the trust to the date of such payment.

"Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

"Third. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent."

○

No. 567

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

UNITED STATES, *Plaintiff in Error,*

vs.

FRED W. WERTZEL, *Defendant.*

MOTION BY DEFENDANT TO DISMISS.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

UNITED STATES, *Plaintiff*
vs.
FRED W. WEITZEL, *Defendant*
No. 567

MOTION BY DEFENDANT TO DISMISS.

Comes now the defendant in error, Fred W. Weitzel, and moves the Court to dismiss the writ of error herein for want of jurisdiction.

Defendant Fred W. Weitzel was the duly appointed, qualified and acting receiver of the First National Bank of London, Kentucky. He was indicted in the District Court for Eastern District of Kentucky, as *receiver* and *agent* of said banking institution, charged with the offense of embezzling certain funds and making false entries in certain reports required by law to be furnished the Comptroller of the Currency, while acting as such receiver, in violation of Section 5209 of the Revised Statutes, which provides that:

> "Every president, director, cashier, teller, clerk or *agent* of any association,

> who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any ~~injury or defraud the association or any~~ other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten."

The defendant filed demurrers to the indictments, which were sustained by the District Court on the ground that the receiver of a national bank appointed by the proper authorities of the United States Government, is not an agent of the banking association within the meaning of said section. The United States sued out a writ of error to this Court, seeking a reversal of the judgment of the District Court. The motion to dismiss the writ is upon the grounds that

the Supreme Court has not jurisdiction. Section 238 of the Judicial Code provides:

> "Appeals and writs of error may be taken from the district courts, including the United States District Court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prizes causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

We respectfully submit that this case does not come within the provisions of Section 238, Judicial Code. The writ of error should have been to the Circuit Court of Appeals, as provided in Section 128, Judicial Code.

Notice of this motion has been served on the opposing counsel.

A. E. STRICKLETT,
Attorney for Defendant in Error.

Durham W. Pickett
Atty for Defendant in Error

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 567.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRED W. WEITZEL, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

A. E. STRICKLETT,
Attorney for Defendant in Error.

JACKSON H. RALSTON,
Of Counsel for Defendant in Error.

INDEX TO CASES CITED.

INDEX TO BRIEF.

BRIEF OF PROPOSITIONS DISCUSSED.

STATE vs. HUBBARD, 51 PAC. 290.

WITTERS vs. SOWLES, 32 FED. REP. 762.

3. A receiver of a national bank is an indifferent person, the instrument of the Comptroller, who appoints such receiver for the purpose of accomplishing certain specific things defined by the statutes; such receiver is at all times under the control and direction of the Comptroller of Currency..... 10

HIGH on RECEIVERS, 3rd Ed., Sections 1 and 360.

KENNEDY vs. GIBSON, 8 WALL. 505.

In Re CHETWOOD, 165 U. S. 458.

TEXAS PACIFIC RAILWAY CO. vs. BLEDSOE, 2 TEX. CIV. AP. 88.

RAILWAY COMPANY vs. GEIGER, 79 TEXAS 13.

BROWN vs. WARNER, 78 TEXAS, 543.

BOOTH vs. CLARK, 17 HOW. 528.

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1917.

No. 567.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRED. W. WEITZEL, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT.

STATEMENT OF CASE.

The defendant in error, Fred W. Weitzel, was the duly appointed, qualified and acting receiver of the First National Bank, of London, Kentucky; on the 17th day of October, 1916, he was indicted in the District Court for Eastern District of Kentucky, as *receiver* and *agent* of the said banking association, charged with the offense of embezzling certain funds and with making false entries in reports required by law to be furnished the Comptroller of the Currency, while acting as such receiver. The indictments were returned under Section 5209 of the Revised Statutes of United States, which is as follows:

> "Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report or statement of the association, with intent in either case to injure or defraud the association or any other company, body

politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The defendant filed demurrers to the indictments in the District Court, which were sustained on the ground that a receiver of a national bank, appointed by the Comptroller of the Currency, is not an agent of a banking association within the meaning of this section. The United States sued out a writ of error to this Court, seeking a reversal of the order of the District Court sustaining the demurrers and dismissing the indictments. The defendant in error filed a motion to dismiss the writ upon the grounds that the Supreme Court is without jurisdiction. The questions therefore presented to the Court are, First: Does a writ of error lie from the Supreme Court to the District Court of the United States to review the judgment of a District Court sustaining a demurrer to an indictment? Second: Is a receiver appointed by the Comptroller of the Currency to take charge of an insolvent national bank as provided by law, an agent of such banking association, within the meaning of Section 5209, Revised Statutes of United States?

ARGUMENT.

As to the first question, **"Does a writ of error lie from the Supreme Court to the District Court of the United States to review the judgment of a District sustaining a demurrer to an indictment?"** the grounds relied upon for dismissal of the writ of error are set out in the motion. We are proceeding upon the idea that the act approved March 3, 1911, known as the Judicial Code, is the only statute authorizing writs of error and appeals from the District Court direct to the Supreme Court of the United States. The Judicial Code prescribes the rules of civil and criminal procedure. Section 128, JUDICIAL CODE, provides as follows:

"The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

This section clearly provides that the decrees and judgments of the Circuit Court of Appeals shall be final in all cases arising under the criminal laws of the United States. The only cases that may be appealed or in which a writ of error may be sued out to the Supreme Court of the United States, direct from a decree or judgment of the District Court, are set forth in Section 238 of the Judicial Code, which is as follows:

"Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

In all cases except as provided in Section 238 of the Judicial Code, the Circuit Court of Appeals shall exercise

The words "president, director, cashier, teller, clerk, or agent" of banking association, are well-defined officials of a banking institution engaged in the regular conduct of its business; the status of receivers, on the other hand, is well defined in law. A receiver is the arm of the court that appoints him, or a receiver is the instrument of the Comptroller, and in either event, whether appointed by a court or by the Comptroller of the Currency, he is an indifferent person, not an agent or representative of either of the parties interested in the matter which he is appointed to take charge of. There can be no question about the application of the words "president, director, cashier, teller or clerk," as used in the statute; so that if a receiver is to come under the provisions of the statute at all, it must be included in the general term "agent" as used in the statute. We contend that the rule, "Where particular words of a statute are used in connection with general, the general words are restricted in meaning to objects of like kind with those specified" should be applied to the construction of this statute. In the case of TODD vs. UNITED STATES, 158 United States, 282, this Court said:

> "It is axiomatic that statutes creating and defining crimes can not be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. There can be no constructive offences, and before a man can be punished, his case must be plainly and unmistakably within the Statute."

Applying here the rule above quoted, clearly a receiver is not included in the statute under which the indictment was brought. The general term "agent," as used in the statute, then is restricted to employees of a solvent National Bank, in the regular and ordinary conduct of its business. The case of JEWETT vs. UNITED STATES, 100 Federal Reporter, 832, the rule contended for was applied by the Court. Jewett was the president of a National Bank and without formally resigning his office, he was constituted the agent of the banking association to close its affairs in liquidation, as provided by the Revised Statutes, Sec. 5220. The offense for which he was indicted was committed while he was acting as such agent.

He was described in certain counts of the indictment as "an agent to assist such association in such liquidation," that as such agent he "had authority from the association to collect all its credits." The Court said:

> "These allegations show that the authority given Jewett with reference to certain very important matters connected with closing the affairs of the association, if not to all of them, was as extensive as that which would have vested in its president and directors if no agent had been appointed.
>
> "Therefore, as we have already said, the spirit of the statute reaches the case. Consequently we are not justified by any rule of construction in so far clipping the letter of the statute, which expressly uses the word "agent," as to exclude this case from its purview. Of course, the rule noscitur a sociis applies here as everywhere; and when the statute groups representatives of the corporation in the following language, "president, director, cashier, teller, clerk, or agent," we are not permitted to hold that one occupying the position of the plaintiff in error is excluded from the classes of persons within its purview, however it might be with some one exercising temporary or special authority, who would not, in the mind of the legislature, be commonly associated with the recognized officers of the bank."

In the case just cited, the defendant was held to come within the provisions of the statute, because he was the chosen agent of the bank, with powers as extensive as those vested in the president or directors; the very source of his appointment brings him within the provisions of the statute, and is within the well-defined status of an agent, and is distinguished from "one exercising temporary or special authority, who would not in the mind of the legislature be commonly associated with the *recognized officers of the bank.*

In the case of UNITED STATES vs. HARTWELL, 6 Wallace, page 385, the Court had under consideration a question very similar to the one in the instant case; the defendant was described in the indictment as clerk in the office of Assistant Treasurer at Boston, and as such was indicted for embezzlement. Seven counts of the indictment were founded on the following section of the Sub-Treasury Act:

"If any banker, broker, or any person, not an authorized depositary of public moneys, shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate or apply any portion of the public money for any purpose not prescribed by law, or shall counsel, aid or abet any disbursing officer or collector of internal revenue or other agent of the United States in so doing, every such act shall be deemed and adjudged an embezzlement of the money so deposited, loaned, transferred, used, converted, appropriated, or applied; (and any president, cashier, teller, director, or other officer of any bank or banking association who shall violate any of the provisions of this act shall be deemed and adjudged guilty of embezzlement of public money), and punished as provided in section two of this act.

The Court said:

"The penal sanction with which the section concludes is as follows: 'And any president, cashier, teller, director, or other officer of any bank or banking association, who shall violate any of the provisions of this act, shall be deemed and adjudged guilty of an embezzlement of public money, and punished as provided in section two of this act.'

"This clause is limited in its terms to the officers named in it. There is nothing which extends it beyond them. It can not, by construction, be made to include any others. It is confined to officers of banks and banking associations. The defendant is not brought within the act by the averments contained in the counts of the indictments, which are founded upon it. They describe him only as a clerk in the office of the assistant treasurer at Boston. As such, the act does not affect him, and the court has no jurisdiction of the offences charged. These counts are, therefore, fatally defective."

In line with the authorities above cited is the case of STATE vs. HUBBARD (Supreme Court of Kansas), 51 PACIFIC 290; we quote from the decision the following:

"A. D. Hubbard was indicted for embezzlement. Hubbard was appointed receiver by the district court. It was charged that as receiver he embezzled. The question was whether a receiver who unlawfully appropriates money which comes into his hands as receiver, or fails to account for or pay over the same on demand, is subject to prosecution and punishment as for embezzlement.

"The defendant was prosecuted upon the theory that he was an agent and under that portion of paragraph 2220 of the compiled laws of 1889 which provides that 'if any agent shall neglect or refuse to deliver to his employer or employers on demand any money, etc.,' which may or shall have come into his possession by virtue of such employment, office or trust."

The Court said:

"Is a receiver an agent within the meaning of the quoted section? The contention of the defendant is that the relation of agency, as ordinarily understood, does not exist between a receiver and the court which appoints him or the parties for whom he acts. A majority of the court agree with this contention and are of the opinion that the receiver is not an agent within the meaning of the statute. It is held that in construing a criminal statute words must be given their ordinary meaning unless it is clear that another was intended, and that to place receivers in a class with agents requires an unusual and strained construction of the statutory language. It does not appear that receivers have ever been designated as agents in our statutes or in the decisions of the courts, and as an evidence that they were not within legislative contemplation attention is called to the fact that in the first part of the section mention is made of executors, administrators, guardians and others vested with official functions somewhat similar to those exercised by receivers, but no mention is made of receivers. It is argued that if the legislature intended to make receivers subject to the penalties of that statute they would have specifically enumerated them with the others of the same general class. . . . . Can it be said that the court is the employer of the receiver, or that he is employed by the parties to the action wherein the receiver is appointed? The Court does not pay the receiver and is not an employer as the term is ordinarily understood. So it is said that the parties

litigant can not be said to have employed him, because they did not consent to his appointment and he does not act under their orders or direction.

"A receiver is generally regarded as an officer of the court and subject to its orders and directions. The property or money which comes into his hands as such officer is regarded as being in custodia legis, to be delivered or paid over to those who may establish a right to the same. He stands in an indifferent attitude, not representing the plaintiff or the defendant, but really representing the court and acting under its direction for the benefit of all the parties in interest. He has no powers other than conferred by his appointment, and being but the hand or arm of the court itself, the conclusion is that he does not stand in the relation of agent to the court or to the parties in litigation."

In the case of WITTERS vs. SOWLES, 32 FED. 762, the Court said:

"Examiner is an officer of the Government. The bank examiner had taken charge upon failure and he advised the bank to take a mortgage from the cashier. It was later attempted to have this mortgage set aside and it was contended that notice on the part of the examiner and also of the receiver was notice to the bank.

"The bank examiner was not an officer or agent of the bank and he had no authority, as such, to act for the bank in any manner. He represents a department of the government which supervises and controls the banks, as to whether in certain cases they shall do business at all or not, but it does none for them other than to wind up their affairs for their creditors."

Applying the rule laid down in the decisions of the courts cited above, as well as that of the text writers, to the case at bar, it requires a strained construction of the statute to bring the defendant within its terms. In sustaining the demurrers, the Court said: "No one can be said to be the agent of another unless he has been chosen expressly or impliedly to act for him and on his behalf. . . . . It is a case also for the application of the maxim, "Noscitur a sociis." A receiver of a National Bank is not appointed by the banking association;

he is appointed by the Comptroller under Section 5234, Revised Statutes. He is the instrument chosen by the governmental authority to accomplish certain specific things, and when those things are accomplished, the Comptroller then calls the shareholders together, and if they so will it, the receiver is discharged, and the institution is turned over to an agent chosen by them, the shareholders. But while the receiver is in charge he is an indifferent person, exercising his functions in the interest of no particular person or parties interested.

HIGH on RECEIVERS (3rd Ed.), Sec. 1, says:

> "A receiver is an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation pendente lite, when it does not seem reasonable to the court that either party should hold it. He is not the agent or representative of either party to the action, but is uniformly regarded as an officer of the court, exercising his functions in the interest of neither plaintiff nor defendant, but for the common benefit of all parties in interest. Being an officer of the court, the fund or property intrusted to his care is regarded as being in custodia legis, for the benefit of whoever may finally establish title thereto, the court itself having the care of the property by its receiver, who is merely its creature or officer, having no powers other than those conferred upon him by the order of his appointment, or such as are derived from the established practice of courts of equity."

The same author in Section 360, in reference to receivers appointed by the Comptroller, says:

> "A receiver of a national bank appointed by the Comptroller, under this section of the act, is limited as to his functions by the object of the receivership and the duties which it involves. Practically such a receiver is the mere agent of the Comptroller of the Currency, for the purpose of bringing the residue of the assets into the United States Treasury. . . . ."

That a receiver is an indifferent person is recognized by the Courts. The case of KENNEDY vs. GIBSON, 8 WALL., page 505, the Supreme Court said:

> "The receiver is the instrument of the Comptroller. He is appointed by the Comptroller, and the power of appointment carries with it the power of removal."

And again in the case of IN RE CHETWOOD PETITIONER, 165 U. S. 458, this Court said:

> "The receiver acts under the control of the Comptroller of the Currency and the moneys collected by him are paid over to the Comptroller, who disburses them to the creditors of the insolvent bank."

In the case of TEXAS PACIFIC RY. CO. vs. BLEDSOE, 2 Texas Civ. Ap. 88, the Court defined the status of a receiver as follows:

> "Receivers are to be regarded, not as the agents of the railway company itself, but as the representatives of the court appointing them."

Again, in the case of Railway Co. vs. Geiger, 79 Texas, 13, in considering the liability of a railway company arising out of the negligence of its agents and servants, the Court said:

> "It is too clear that receivers in charge of and operating a railway are not, within the meaning of the Statute, either its servants or agents."

And in the case of BROWN vs. WARNER, 78 Texas, 543, the Court said:

> "The receiver is but the agent of the Court that appoints him."

In the case of BOOTH vs. CLARK, 17 Howard, 528, the Supreme Court of United States, in defining the legal status of a receiver, said:

> "A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. Wyatt's Prac. Reg. 355. He is an officer of the court;

his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. Delany v. Mansfield, 1 Hogan, 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court; Verplanck vs. Mercantile Insurance Company, 2 Paige, C. R. 452."

It is unnecessary to cite further authority to sustain defendant's position in this case. The authorities above cited amply sustain the ruling of the District Court, and therefore, the judgment sustaining the demurrers and quashing and dismissing the indictment should be SUSTAINED.

Respectfully submitted,

A. E. STRICKLETT,

Attorney for Defendant in Error.

JACKSON H. RALSTON,

Of Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 567.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

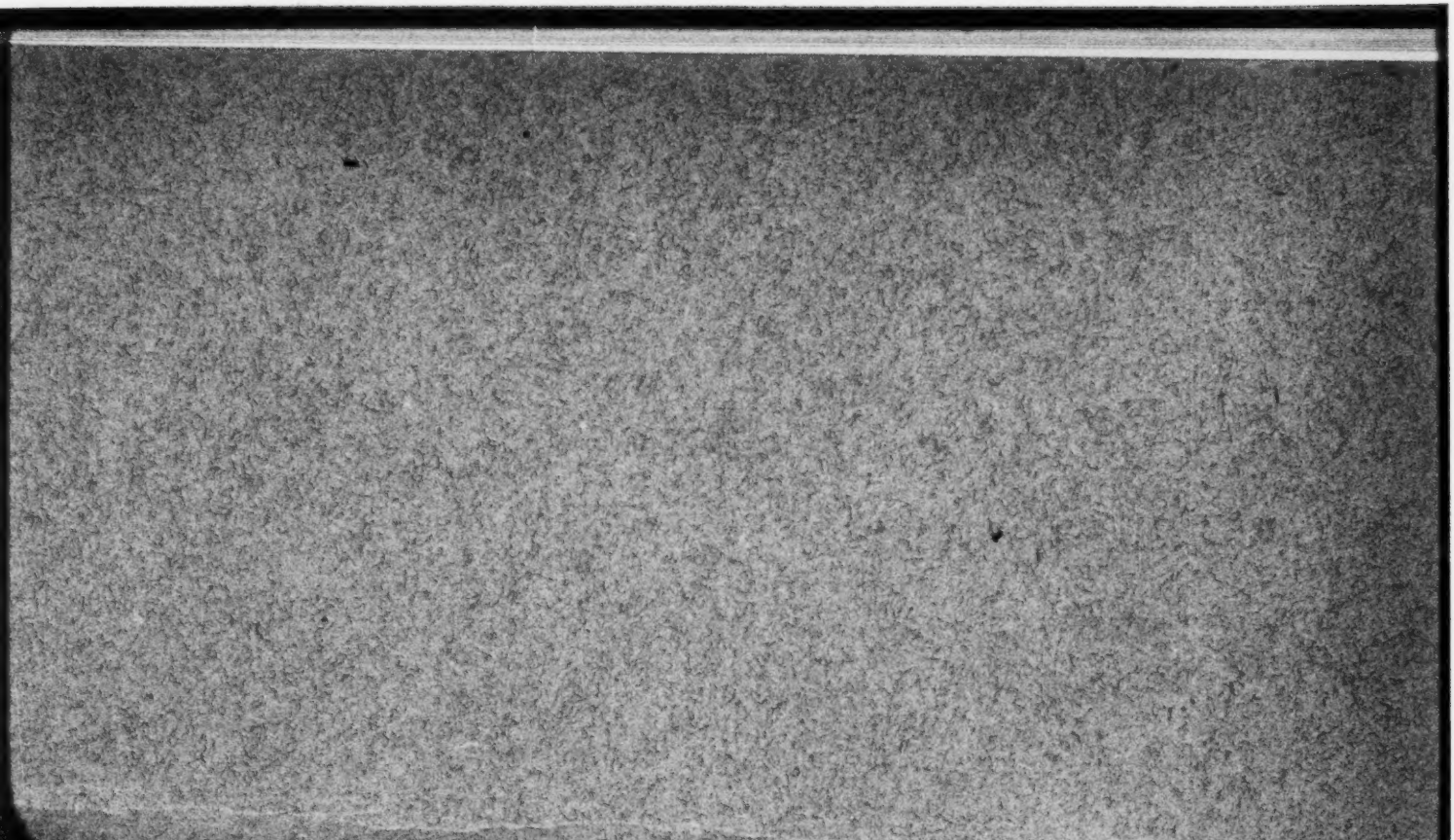
FRED W. WEITZEL, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

A. E. STRICKLETT,
Attorney for Defendant in Error.

JACKSON H. RALSTON,
Of Counsel for Defendant in Error.



INDEX TO CASES CITED.

SUPREME COURT OF UNITED STATES,

OCTOBER TERM, 1917.

No. 567.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRED. W. WEITZEL, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF.

Since preparing the original brief for the defendant in error in this cause, a typewritten copy of the brief of the Solicitor General has been handed me.

We want to emphasize the proposition advanced in our original brief, that a receiver appointed by the Comptroller of the Currency is in no respect a representative of the bank for which he is appointed to take charge. The Solicitor General has called attention to the conditions that may be the occasion for the appointment of a receiver by the Comptroller. The proposition that we have to deal with is rather the status of the receiver after his appointment. His duties are fixed by statute, and from his duties we may conclude his representative capacity. Section 5234 Revised Statutes sets forth clearly these duties.

Under the direction of the Comptroller, the receiver shall

(a) Take possession of the books, records and assets of every description of such association;

(b) Collect all debts, dues and claims belonging to it;

(c) Upon order of court of record of competent jurisdiction, may sell or compound bad or doubtful debts;

(d) Upon order of court of record of competent jurisdiction, may sell real and personal property of such association;

(e) If necessary to pay the debts of such association, enforce individual liability of the stockholders;

(f) Such receiver shall pay over all money to the Treasurer of United States, subject to the order of the Comptroller;

(g) Make report to the Comptroller of all his acts and proceedings.

After the receiver shall have performed his duties as set forth, then the Comptroller, under Section 5236 of the Revised Statutes, shall

(a) Provide for refunding to United States any deficiency in redeeming the notes of such association;

(b) Make ratable dividends of the money so paid over to him by the receiver on all claims proved or adjudicated;

(c) Pay balance of proceeds to shareholders or their legal representatives, in proportion to the stock held by them.

After the Comptroller has provided for conditions (a) and (b) above set forth, then the Act of June 30, 1876, provides:

". . . . the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the said re-

ceiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the said association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall, by vote of a majority of the stock in value and number of shares, determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided; and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharged in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer or other instrument in writing that may be necessary and proper; and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this Act be discharged from any and all liabilities to such association and to each and all the creditors and shareholders thereof."

The duties of the receiver and the Comptroller cease upon the execution of the deed or transfer as provided in this section, and then the duties of the agent selected by the shareholders of the association begin, and his duties are defined in Section 3 of Act June 30, 1876, to be as follows:

"Upon receiving such deed, assignment, transfer or other instrument, the person elected such agent shall hold, control and dispose of the assets and property of such association which he may receive under the terms hereof for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond."

The final distribution of the assets are provided for in Sub-Sections 1, 2 and 3 of Section 3 of Act June 30, 1876, as follows:

First: To pay the expenses of the execution of the trust to the date of such payment.

Second: To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

Third: The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent."

It will be observed from the provisions of the statute, that the receiver's acts are absolutely under the control of the Comptroller, and in no respect does such receiver act independently, nor is he in any respect directly or indirectly accountable to the association or its shareholders. The Comp-

troller distributes the assets of the association after the same are put in the hands of the Treasurer, subject to the order of the Comptroller; after the agent is appointed by the shareholders as provided in the act of June 30, 1876, then the receiver's duties cease, and the agent of the association takes charge to wind up the affairs of the association and make final distribution of the money as provided in Sub-Sections 1, 2 and 3 of Section 3 of the Act approved June 30, 1876, *supra.*

The case of the UNITED STATES vs. CORBETT, 215 U. S. 233, cited by the Solicitor General is not in point. In that case the question involved turned upon who was included in the term "agent" used in that part of the section which penalizes false entries, "with intent . . . . to deceive . . . . any agent appointed to examine the affairs of any such association . . ." Under the National Bank Act the Comptroller of the Currency is empowered to exercise supervisory powers over national banks, and is empowered to appoint subordinates to examine national banks. This Court on page 243 said:

> "It is to be observed that the rule thus stated affords no ground for extending a penal statute beyond its plain meaning. But it inculcates that a meaning which is within the text and within its clear intent is not to be departed from because, by resorting to a narrow and technical interpretation of particular words, the plain meaning may be distorted and the obvious purpose of the law be frustrated. Bolles vs. Outing Co., 175 U. S. 262, 265, and especially United States vs. Union Supply Company, decided this term, *ante*, p. 50.
>
> "Indeed, the aptness of the application of the principle just stated to the case in hand is well illustrated by the following considerations. If by distorting the rule of strict construction we were to construe the words of the statute, "any agent appointed to examine," so as to exclude the Comptroller of the Currency, the principal agent appointed for such purpose, by the same method we should be compelled to adopt the reasoning of the court below and to narrow the statute so as to exclude the intent to deceive by false entries in the report, an agent to whom the report was not to be made and who might not be called upon to

> examine the same, thus, in effect, as to intent to deceive any agent, destroying the statute. And this impossible conclusion at once serves to point out the correctness of the interpretation of the statute assumed in the Cochran case, that the intent to deceive, for which the statute provides, is an intent to deceive the official agents concerned in overseeing the bank and supervising its operation and the conduct of its business, including, of necessity, the Comptroller of the Currency and the subordinate agents or examiners whom the statute authorized him to appoint."

To have held that the Comptroller was not embraced in the class included in the words of the statute, "any agent appointed to examine," would in the Corbett case have practically defeated the purpose of the statute. But on the other hand, to hold that a receiver of a banking association, appointed by the Comptroller, is included in the term "agent" used in the statute in connection with "president, director, cashier, teller, clerk . . . . of any association," would be giving the statute a meaning not intended by the Congress.

In the case of MERCANTILE TRUST CO. vs. ST. LOUIS & S. F. RY. CO., 99 Federal Reporter, 489, 494, the Court said:

> "A receiver is an indifferent person, appointed by a court as a quasi officer or representative of the court, to take charge of, and sometimes to manage, the property in controversy, under the direction and control of the court during the continuance of or in pursuance of the litigation. The appointment of a receiver determines no right. He is a part of the machinery of the court by which equity protects and secures the rights of parties—all parties in interest. His custody is that of the law. Booth vs. Clark, 17 How. 322, 15 L. Ed. 164. When, therefore, the court concluded to assume jurisdiction, and to take the property into its custody, it became, not the right, but the duty of the court to place it in the hands of a receiver, its own officer, whose possession was its possession, and who should hold it, not for this party or that, but, as the representative of the law, for the protection of those whose rights should appear."

While the receiver in the last cited case was appointed by the court, yet the principle followed in that case is applicable to the case at bar. The receiver appointed by the Court is the arm of the Court, so a receiver appointed by the Comptroller of the Currency is "the instrument of the Comptroller." That there is no other Federal statute under which a defaulting receiver of a national banking association may be indicted is no reason for giving Section 5209 of the Revised Statutes a construction which was never intended by the Congress. If a wrong has been committed for which no penalty is prescribed, then it is the plain duty of Congress to remedy the evil by appropriate legislation, but never the duty of the Judicial Department to usurp the functions of the Legislative Department by extending the meaning of a statute by judicial construction, so as to include a class of persons foreign to the letter of the law, in order to provide the needed remedy. Such a condition, to use the words of the learned Solicitor General, would be "abhorrent to our conception of the principles of natural justice."

That the powers of a receiver and an agent are very much the same under the statutes is not conclusive that their representative capacity are similar. It is the paramount purpose of the receiver to convert the assets of the association into cash, turn it over to the Treasurer of the United States (a) to provide for refunding to the United States any deficiency in redeeming the notes of the association, and (b) to pay the claims proved or adjudged against the association, after accomplishing which the Comptroller then calls the stockholders together, and turns back the residue of the proceeds to an "agent" elected by the shareholders if they so determine, and thereupon the Comptroller and the receiver transfer all property to such "agent," who proceeds in form and manner by statute provided, to close up the affairs of the association. Thus it is seen that the appointment of an agent is by the shareholders whom he represents, while the receiver is appointed by the Comptroller of the Currency for the purpose of providing means for refunding the notes of the association and to pay its obligations. The relationship of agency imposes a duty on the agent to his principal, or the principal may impose his will on the agent in the performance of the services for which he

was employed. But a national banking association can not direct the receiver in the performance of his duties; the Comptroller of the Currency alone may direct the receiver, and to the Comptroller alone shall the receiver report his acts.

The Court is not concerned in this case as to whether a receiver of a national banking association is an officer of the United States. The Court is asked to decide a concrete case, and a decision of the question as to whether a receiver of a national banking association appointed by the Comptroller of the Currency is an officer of the United States is not necessary to determine the question involved in the case presented. But we concur in the conclusion of the Solicitor General that he is not such an officer. This has been determined in the cases of United States vs. Germaine, 99 U. S., 508, and United States vs. Monat, 124 U. S., 303.

It is true that in a few cases a receiver of a national banking association has been held to be an officer of the United States, but these decisions are limited to the construction of special jurisdictional statutes. (KENNEDY vs. GIBSON, 8 WALL. 498.)

We submit that the judgment of the District Court of Eastern District of Kentucky should be affirmed.

Respectfully submitted,

A. E. STRICKLETT,

Attorney for Defendant in Error.

JACKSON H. RALSTON,

Of Counsel for Defendant in Error.

UNITED STATES *v.* WEITZEL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 567. Argued March 7, 1918.—Decided April 15, 1918.

Section 5209, Rev. Stats., punishing embezzlements and false entries by any "president, director, cashier, teller, clerk, or agent" of a national bank, does not apply to a receiver of such a bank, appointed by the Comptroller of the Currency under Rev. Stats., § 5234; he is an officer of the United States and not an agent of the bank.

Statutes creating and defining crimes are not to be extended by intendment upon the ground that they should have been made more comprehensive.

Affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Warren for the United States:

The powers, functions, and duties of a national bank receiver are such as to constitute him an "agent" of the bank, within the broad meaning of that word, as used

in Revised Statutes, § 5209. It should be noted that a statutory receiver of a national banking association is not the officer of, nor appointed by, or responsible to, any court. *In re Chetwood*, 165 U. S. 443, 458. He is appointed by the Comptroller of the Currency to act for the bank, in pursuance of special statutory provisions whence the receiver derives his powers and to which he must look for guidance in the performance of his functions. He is paid out of the funds of the bank; he takes the place of the bank; his signature is the signature of the bank. The efficient liquidation of a bank usually requires considerable negotiation; it may require various contracts which do not immediately operate to liquidate its assets; the receiver conducts many transactions in behalf of the bank while engaged in the general process of liquidation; and in these transactions he may be said to represent the bank and all those who own an interest in the business of the bank. That he acts for the bank, as well as for the creditors, is clear, since in many cases, after payment of creditors, the receiver turns back assets to the bank either for continuance of business by it or for liquidation by an agent chosen by the bank, as provided in the Act of June 30, 1876, c. 156, § 3, 19 Stat. 63. *Bank* v. *Kennedy*, 17 Wall. 19, 22, 23.

The appointment of the receiver does not work dissolution of the bank or affect suits pending against it, or incapacitate it from suing or being sued. Its corporate existence continues after the appointment of a receiver and until its affairs have been finally wound up. *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1, 7; *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall. 383, 400.

In *Rosenblatt* v. *Johnston*, 104 U. S. 462, 463, it is said that the bank's "property and assets, in legal contemplation, still belong to the bank, though in the hands of a receiver, to be administered under the law. The bank did not cease to exist on the appointment of the receiver."

A receivership may be of a temporary or provisional nature, and may last only long enough to satisfy the Comptroller that the bank is not insolvent, or that the facts do not present a case for a receiver as provided by the statute. See *Jackson* v. *Fidelity & Casualty Co.*, 75 Fed. Rep. 359, 364.

In *Case* v. *Terrell*, 11 Wall. 199, it was held that the receiver of a national bank represents the bank, its stockholders, and creditors, and that neither he nor the Comptroller of the Currency can subject the Government to the jurisdiction of the ordinary courts to determine the conflicting claims of the United States and other creditors in the hands of such a bank. In the course of the opinion, it was said (p. 202): "He represents the bank, its stockholders, its creditors, and does not in any sense represent the Government." See *Kennedy* v. *Gibson*, 8 Wall. 498, 506.

Revised Statutes, § 5209, was intended to cover the whole ground of defalcations which might be committed by all those who might have any connection with, or control over, the assets, funds, credits, books and papers of a national bank. In the first place, it should be particularly noted that although the National Bank Act was passed in 1863—55 years ago—this case is the first instance, so far as the reports show, in which the contention has ever been raised that an embezzling national bank receiver was not punishable under the act, like any other embezzling representative of the bank. Since it would strain the credulity of the hardiest optimist as to human nature to believe that this is the first instance of a dishonest bank receiver, it would seem that the point would have been taken by some keen attorney during these 55 years "if it had been supposed by anyone that such legislation" failed to provide for such prosecution. *Fairbanks* v. *United States*, 181 U. S. 283, 323.

Embezzlement by a receiver falls squarely within the

evil at which the section was aimed, and the statute should be so construed as to effectuate its evident intent. The statute punishes the acts of three classes of persons: (*a*) president, director, cashier, teller; (*b*) clerk; (*c*) agent. The first class (*a*) are referred to in the section as "officers," for it provides that "every person who with like intent aids or abets any *officer*, clerk, or agent in any violation of this section," etc. These three classes of persons were clearly intended to include every person acting for the bank who would have any control over its funds, credits, books, or papers. See *Commonwealth* v. *Wyman*, 8 Metc. 247, 252; *State* v. *Barter*, 58 N. H. 604, 605; *Wynegar* v. *State*, 157 Indiana, 577, 579, 580; *Clement* v. *Canfield*, 28 Vermont, 302, 304.

The Government contends that the word "agent," in the first line of the section, should, in order to effectuate the full purpose, be given as reasonable a construction as this court gave to the word "agent" in the twelfth line of the same section in *United States* v. *Corbett*, 215 U. S. 233.

The lower court's decision will have this result: That a national bank clerk may be indicted under a statute which affixes a minimum penalty of five years' imprisonment, whereas a national bank receiver may be indicted in a federal court (if at all) only under a statute which contains no minimum penalty and makes it possible for him to escape with a simple fine (Federal Criminal Code, § 97). The Government contends that it is the clear duty of this court to so construe § 5209 as to avoid any such unjust and ridiculous result.

A national bank receiver is not an officer of any court and has not the status of a judicial receiver. He is simply a liquidating agent provided for the bank by the statute. In accepting its charter, the bank accepts all the provisions of the National Bank Act, including the provision for appointment of such a liquidating agent or receiver;

and when such a receiver is appointed as such an agent by the Comptroller, his appointment is impliedly authorized by the bank.

An agent may be constituted either by express act, or by implication, or by ratification, or by acceptance of statutory conditions, or by operation of law. Mechem on Agency, 2d ed., 1914, § 26. A corporation for certain purposes may be conclusively deemed to assent to the appointment by statute of an agent to accept service. It is well-established law that the charter of a corporation embraces the provisions of law contained in the special or general statute under which the organization is formed; and the corporation accepts all such provisions as part of its charter. Each national bank, therefore, impliedly consents to the appointment of such an agent to act for it upon the happening of any of the stipulated contingencies, and it accordingly assents to the authorized acts of such receiver when duly appointed.

The Government contends that the doctrines relative to judicial receivers are not in any way pertinent, and that the text books and cases which state broadly that a judicial receiver is not the agent of the corporation (see *Metz* v. *Buffalo &c. R. R.*, 58 N. Y. 61, 66; *State* v. *Hubbard*, 58 Kansas, 797, 801), do not apply in any way to this statutory bank receiver. If the statute, instead of saying in § 5234, "The Comptroller of the Currency may forthwith appoint a receiver," had said that he might appoint "an agent," or a "superintendent," or a "liquidator," the attempt to apply to such an appointee judicial decisions which referred solely to court receivers would never have been made. *Union Bank of Brooklyn* v. *Kanturk Realty Corporation*, 72 Misc. (N. Y.) 96, 97.

A distinction between a "chancery, or, as it is sometimes called, a common receiver," and a statutory receiver is taken in *Stokes* v. *Hoffman House*, 157 N. Y. 554, 559;

and referred to in *Quincy, Missouri & Pacific R. R. Co.* v. *Humphreys*, 145 U. S. 82, 97.

The functions and duties of a receiver are substantially the same as those of liquidating agent of the bank provided for impliedly under Rev. Stats., § 5220, and expressly under § 3 of the Act of June 30, 1876. Such a liquidating agent and a receiver both represent the bank in its corporate capacity, and act for its benefit. A liquidating agent has been held by the courts to be indictable under Rev. Stats., § 5209.

In *Jewett* v. *United States*, 100 Fed. Rep. 832, it was held that a liquidating agent, who was appointed in voluntary dissolution under § 5220, was an "agent" within the meaning of § 5209. Other statutes, moreover, provide expressly for another liquidating agent, i. e., an agent to be appointed by the shareholders to take over the bank's affairs after the receiver has ended his duties. See Act of June 30, 1876, c. 156, § 3, 19 Stat. 63. Of such an agent it was said, in *McConville* v. *Gilmour*, 36 Fed. Rep. 277: "The 'agent' is only the 'receiver' under another name. . . . Each of these administrative officials—the 'receiver' and the 'agent'—represent the bank in its corporate capacity, and neither of them is more or less than the other such a representative." The same view was taken in *Guarantee Co. of North Dakota* v. *Hanway*, 104 Fed. Rep. 369, 372. A "liquidating agent" appointed by the shareholders is indictable under § 5209 as an "agent." See *Jewett* v. *United States*, *supra*.

A decision that a receiver is an officer of the United States within the purview of the federal criminal laws will be attended by the following extraordinary results:

First. That from the year 1863 to the year 1879, an embezzling receiver of a national bank could not have been prosecuted under any federal criminal statute; for it was not until the latter year that, by the Act of February 3, 1879, c. 42 (20 Stat. 280; now § 97 of the Federal

Criminal Code), it was first made a crime for an officer of the United States to embezzle any money or property which came into his possession or under his control in the execution of his office.

Second. That from the year 1876 to the year 1879, a liquidating agent of a national bank appointed under the Act of June 30, 1876, § 3, apparently could not have been prosecuted for embezzlement under any federal criminal statute; for *Guarantee Co. of North Dakota* v. *Hanway, supra*, held that such a liquidating agent is an officer of the United States "in every sense in which the receiver is."

Neither the manner of appointment, method of payment of salary, nor duration or tenure of office are such as to constitute a national bank receiver an officer of the United States. His appointment is by the Comptroller of the Currency, and is not required to be approved by the Secretary of the Treasury (Rev. Stats., § 5234); he is paid out of the assets of the bank before distribution of the proceeds (Rev. Stats., § 5238); and he is appointed for no definite time, and for no fixed statutory salary.

Such a receiver clearly does not come within the purview of the term "officer of the United States" as that term is construed in criminal statutes. *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Germaine*, 99 U. S. 508, 510; *United States* v. *Mouat*, 124 U. S. 303, 307; *United States* v. *Smith*, 124 U. S. 525, 533; *Martin* v. *United States*, 168 Fed. Rep. 198; *Scully* v. *United States*, 193 Fed. Rep. 185; *United States* v. *Van Wert*, 195 Fed. Rep. 974. *Cf. Thompson* v. *Pool*, 70 Fed. Rep. 725, 727, 728.

The fact that for the limited purpose of suing in the federal courts a national bank receiver has been held to be an officer of the United States, as that term is used in statutes granting jurisdiction to federal courts, is not incompatible with the status of the receiver as an agent

of the bank. To this extent, he acts in a dual capacity. *Kennedy* v. *Gibson*, 8 Wall. 498, 504; *Price* v. *Abbott*, 17 Fed. Rep. 506–508.

It seems clear, however, that the decisions only go to the limited extent of holding a receiver to be an officer of the United States within the meaning of that term in certain special jurisdictional statutes; e. g., Rev. Stats., § 563, cl. 4; § 629, cl. 3; § 380.

There is nothing unusual in one term having two distinct meanings in two different statutes (*Lamar* v. *United States*, 240 U. S. 60, 65); and the best illustration of this fact is to be found in two consecutive cases in 124 U. S., in which in *United States* v. *Mouat*, p. 303, a paymaster's clerk was held *not* to be an "officer of the Navy" within the meaning of the Act of June 30, 1876, c. 159, 19 Stat. 65, whereas in *United States* v. *Hendee*, p. 309, a paymaster's clerk was held to be an "officer of the Navy" within the meaning of the Act of March 3, 1883, c. 97, 22 Stat. 473.

Mr. A. E. Stricklett, with whom *Mr. Jackson H. Ralston* was on the briefs, for defendant in error.

Mr. Justice Brandeis delivered the opinion of the court.

The Comptroller of the Currency is charged with the duty of supervising national banks. When he deems it necessary to take possession of the assets of a bank and assume control of its operations, he appoints a receiver under Rev. Stats., § 5234. Weitzel, so appointed receiver, was indicted in the District Court of the United States for the Eastern District of Kentucky under Rev. Stats., § 5209, for embezzlement and making false entries. That section does not mention receivers, but provides that "every president, director, cashier, teller, clerk, or agent"

of a national bank who commits these offences shall be punished by imprisonment for not less than five nor more than ten years. The Government contended that the receiver was an "agent" within the meaning of the act. A demurrer to the indictment was sustained on the ground that he is not. The court discharged the prisoner and the case comes here under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246.

The receiver, unlike a president, director, cashier, or teller, is an officer, not of the corporation, but of the United States. *In re Chetwood*, 165 U. S. 443, 458. As such he gives to the United States a bond for the faithful discharge of his duties; pays to the Treasurer of the United States moneys collected; and makes to the Comptroller reports of his acts and proceedings. Rev. Stats., § 5234. Being an officer of the United States he is represented in court by the United States attorney for the district, subject to the supervision of the Solicitor of the Treasury, § 380. *Gibson* v. *Peters*, 150 U. S. 342. And because he is such officer, a receiver has been permitted to sue in the federal court regardless of citizenship or of the amount in controversy. *Price* v. *Abbott*, 17 Fed. Rep. 506. In a sense he acts on behalf of the bank. The appointment of a receiver does not dissolve the corporation, *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1, 7; the assets remain its property, *Rosenblatt* v. *Johnston*, 104 U. S. 462; the receiver deals with the assets and protects them for whom it may concern, including the stockholders; and his own compensation and expenses are a charge upon them. § 5238. But a receiver is appointed only when the condition of the bank or its practices make intervention by the Government necessary for the protection of noteholders or other creditors.[1] While the receivership continues the corporation is precluded from

[1] See Rev. Stats., §§ 5234, 5141, 5151, 5191, 5201, 5205, 5208.

dealing by its officers or agents in any way with its assets. And when all creditors are satisfied or amply protected the receiver may be discharged by returning the bank to the control of its stockholders or by the appointment of a liquidating agent under Act of June 30, 1876, c. 156, 19 Stat. 63. Whether, as the Government assumes, such statutory agent who is elected by the stockholders is included under term "agent" as used in § 5209, we have no occasion to determine. The question was expressly left undecided in *Jewett* v. *United States*, 100 Fed. Rep. 832, 840. But the assumption, if correct, would not greatly aid its contention. The law can conceive of an agent appointed by a superior authority; but the term "agent" is ordinarily used as implying appointment by a principal on whose behalf he acts. The fact that in this section the words "clerk, or agent" follow "president, director, cashier, teller" tends, under the rule of *noscitur a sociis*, to confirm the inference. *United States* v. *Salen*, 235 U. S. 237, 249. Furthermore, the term "agent of a bank" would ill describe the office of receiver.

Section 5209 is substantially a reënactment of § 52 of the Act of February 25, 1863, c. 58, 12 Stat. 665, 680, the first National Bank Act. It is urged by the Government, that the punishment of defalcation by a receiver is clearly within the reason of the statute and that, unless the term "agent" be construed as including receivers, there was no federal statute under which an embezzling receiver of a national bank could have been prosecuted, at least until the Act of February 3, 1879, c. 42, 20 Stat. 280, made officers of the United States so liable therefor; and, indeed, cannot now be, because he should not be held to be an officer. The argument is not persuasive. Congress may possibly have believed that a different rule should be applied to an officer of the United States who is selected by the Comptroller for a purpose largely different from that performed by officers of the bank, and who gives bond for the

faithful discharge of his duties. Furthermore a *casus omissus* is not unusual, particularly in legislation introducing a new system.[1] The fact that in 1879 Congress should have found it necessary to enact a general law for the punishment of officers of the United States who embezzle property entrusted to them, but not owned by the United States, shows both how easily a *casus omissus* may arise and how long a time may elapse before the defect is discovered or is remedied. Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive. *Todd* v. *United States*, 158 U. S. 278, 282. *United States* v. *Harris*, 177 U. S. 305.

The judgment of the District Court is

Affirmed.

---

[1] For example: 1. Extortion by government "officers": Act of March 3, 1825, c. 65, § 12, 4 Stat. 118 (R. S., § 5481); *United States* v. *Germaine*, 99 U. S. 508; amended by Act of June 28, 1906, c. 3574, 34 Stat. 546, to include "clerk, agent, or employee," and every person assuming to be such officer, etc. 2. Mailing obscene writings: Act of July 12, 1876, c. 186, 19 Stat. 90 (R. S., § 3893); *United States* v. *Chase*, 135 U. S. 255; amended by Act of Sept. 26, 1888, c. 1039, 25 Stat. 496, to include "letters," *Andrews* v. *United States*, 162 U. S. 420. 3. Intimidating witness: Act of April 20, 1871, c. 22, § 2, 17 Stat. 13 (R. S., § 5406); *Todd* v. *United States*, 158 U. S. 278; amended by Criminal Code (1909), § 136, to include witnesses before a "United States commissioner or officer acting as such," as well as witnesses before "courts." 4. Introducing liquor into Indian country: Act of March 15, 1864, c. 33, 13 Stat. 29 (R. S., § 2139); *Sarlls* v. *United States*, 152 U. S. 570; amended by Act of July 23, 1892, c. 234 27 Stat. 260, to prohibit the introduction of "ale, beer, wine, or intoxicating liquor or liquors of whatever kind," as well as "ardent spirits." 5. Perjury: Act of March 3, 1869, c. 130, 15 Stat. 326 (R. S., § 5211; see also R. S., § 5392); *United States* v. *Curtis*, 107 U. S. 671; amended by Act of Feb. 26, 1881, c. 82, 21 Stat. 352, to include false swearing before a "notary public" or "any other officer" properly authorized by the State to administer oaths.